"POST-NOLLAN" LAND USE PLANNING:

HOW COMMUNITIES ARE COPING WITH THE RECENT SUPREME COURT DECISION

by

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ABSTRACT:

The recent Supreme Court ruling on Nollan v. California Coastal Commission was predicted to have a "chilling effect" on professional planners and municipal officials engaged in land use regulation. This thesis involves four case studies of communities to document this supposed "chilling effect". The study examines of two cities, Newton, Massachusetts and Pawtucket, Rhode Island and two towns, Amherst and Plainville, Massachusetts. Each is quite different from the others in size, skill of planning and legal staff, growth stance, and political orientation. The case studies analyze the communities in terms of these distinguishing variables, and present the background for observing any "chilling effect", or altered pattern of planning as a result of Nollan.

None of the communities provided an example of the predicted "chilling effect". On the contrary, there were two examples where aggressive, adventurous planning was actually strengthened as a result of Nollan. Both the City of Newton and the Town of Amherst, Massachusetts provided examples of cautiously-bold planning in the wake of Nollan. In Newton, an existing inclusionary zoning ordinance was reconsidered as a result of Nollan, and actually made better for the City, tighter in the face of the law as set forth in Nollan. In Amherst, an innovative and aggressive, phased-growth control program, under consideration before Nollan was approved by the town, upon the recommendation of the professional staff, after having analyzed the effect of the case on Amherst. In the two other communities, officials showed relatively little concern with the case. Plainville, Massachusetts provides the example of a very small community, just beginning to identify the need for any planning whatsoever, which is aware of Nollan, but is relatively certain that it will not be affected. Finally, there was no altered pattern or chilling affect noticed at all in Pawtucket, Rhode Island. The nominal planning activity which occurs now in that city will continue, unphased by the fury surrounding the Nollan decision in planning nation-wide.

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CHAPTER ONE: BACKGROUND AND INTRODUCTION TO THE THESIS

1.1. INTRODUCTION:

"The difficulty of determining, in cases involving nothing like a physical invasion or tresspass, just how far is 'too far' has predictably plagued the Court for over six decades, and the attempt to differentiate 'regulation' from 'taking' has become the most haunting jurisprudential problem in the field of contemporary land use law ... one that may be the lawyer's equivalent of the physicist's hunt for the quark."[1]

This dilemma of the nation's courts has been manifested in the planning practice. Planners are generally those who help a community to determine such things as public benefit and legitimate state interest. Over time, the management of physical resources through planning has been established as a legitimate exercise of a municipality's police power. This has been affirmed by the United States Supreme Court, and is described further in Chapter Two. Throughout this century, the Court has supported planning, and the use of government funding and resources to provide plans and planning techniques as a way to protect the public interest.

However, in the summer of 1987, the Court, which had recently taken on a more conservative tenor following recent appointments, handed down two rulings on land use cases which flustered planners,

[1]Tribe, Lawrence H. American Constitutional Law, Mineola, NY: The Foundation Press, 1988, p. 595.

city officials, developers, builders, land-owners, and lawyers alike. These two cases, Nollan v. California Coastal Commission (Nollan)[2] and First English Evangelical Lutheran Church of Glendale v. County of Los Angeles (First English),[3] at first glance, seemed to jeopardize much of what has become the planning practice today, by "creating a new environment for land use regulation, and raising the stakes for developers and committees involved in shaping development".[4]

Briefly, First English concludes that if a regulation amounts to a taking, there must be compensation to the property owner for loss of use of the land, even for the interim period while the issue is being litigated. The land-owner must be paid damages, in a sense, for the land being "rented" by the municipality during the time the regulation was in effect, and prior to the regulation being determined a taking. The Court said nothing about clarifying the process of determining whether a taking has occurred, even in this particular case. Also, the Court leaves the question of how these temporary damages should be assessed and quantified.

Previously, if a regulation was found to be a taking, the regulation was merely negated. Now, after First English, public officials, in good faith, might enact a regulation or impose a condition, which if found to be a taking at some later date, would oblige the government to compensate a property owner who was denied

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[2]107 S.Ct. 3141

[3]107 S.Ct. 2378

[4]Warner and Stackpole, "The Taking Issue and Land Use Regulation: The Recent U.S. Supmreme Court Decisions". Conference sponsored by Warner and Stackpole, Boston, September 11, 1987. p. 2.

use of his or her land during the time the regulation was in effect. Some say that in this opinion the Court appears to be saying that governments were trying to reach farther than they knew was legal, knowing that if the regulation was later found to be too restrictive, that they would merely forfeit the regulation from the ordinances or by-laws. Now, the Court is attempting to discourage this supposed practice, by imposing significant financial consequences as well.

Second, the Nollan decision is concerned with conditions imposed under police power. The holding of the Court is that any condition to a permit must be directly related to the grounds on which the permit could have originally been denied. Also, the Court suggests that in addition to permit conditions, there must be an "essential nexus", a connection between any regulation and a public purpose. Finally, in a key but difficult footnote, the Court also suggests a "new standard" when judging whether this nexus exists Some say that this means that the burden of proof shifts from the one questioning an ordinance or regulation, to the government body which enacted it.

Previously, courts would allow a regulation if there were even a remote possibility that it could be related to a public purpose. Now, the Court seems to be saying the presumption of validity has changed. No longer is the municipality initially presumed to be right, but instead it must prove the legitimacy of its regulation.

Some say that this is only fair, and anyone who has been practicing good planning should have known this already. Others say that it removes a lot of local discretion from a municipality to consider its needs in sum.

The impact of these two cases taken together is even more significant. According to Nollan, the likelihood of making a mistake and crossing the constitutional line into a regulatory taking increases. Also, the consequences, particularily financial, of making such a mistake increase, due to the First English case.

Finally, there are some significant ambiguities which come out of these two cases. First, the First English case leaves it to a lower court to determine whether the regulation was in fact a taking. It says nothing about a clear standard by which the taking can be concluded. Second, the Nollan case opens the possibility of a new standard to be used when judging whether a condition or regulation is "related" to a public purpose. Justice Scalia addresses this in a footnote, claiming that the standard explained in the opinion has always existed. The dissenters vigorously disagree, saying that the majority is asking for an "eye for an eye mentality".

Even the dissenters in the cases made predictions as to what the effect would be on planning. In the majority opinion for First English, Chief Justice Rehnquist wrote, "We realize that even our present holding will undoubtably lessen to some extent the freedom and flexibility of land use planners and governing bodies of municipal

corporations when enacting land use regulations." In his dissent to Nollan, Justice Stevens refers to the "unprecedented chilling effect that such a rule will obviously have on public officials charged with the responsibility for drafting and implementing regulations designed to protect the environment and the public welfare". Through the rest of 1987, professionals and academics began to speculate as to what these two cases would mean to the future of planning, to the shape of the practice, and to the future land-uses in this country.

1.2. RESEARCH QUESTIONS:

This work is focused on Nollan, the case which some find more interesting, slightly more ambiguous, and potentially more far-reaching than First English. This thesis goes beyond speculation as to the legal implications of this case, and provides a look at some real planners in real communities who practice real planning. The result is some preliminary conclusions based on some data, as to how the planning profession is reacting to this case in terms of potential patterns (whether observed or stated), or actions.

The main question guiding the research in this thesis has to do with the predicted chilling effect. Has the chilling effect occurred, and to what degrees? The thesis has also been prompted by questions about town planning. What aspects of a town or city make it more or less receptive to planning initiatives? How does planning in the context of a town differ from that within a city? How does planning vary with the historical development of different regions of the country? What are the different variables which identify and

distinguish a community, and then determine how planning will occur in that place? How do each of these differing variables among communities influence the impact that Nollan has on planning in that community?

1.3. RESEARCH DESIGN:

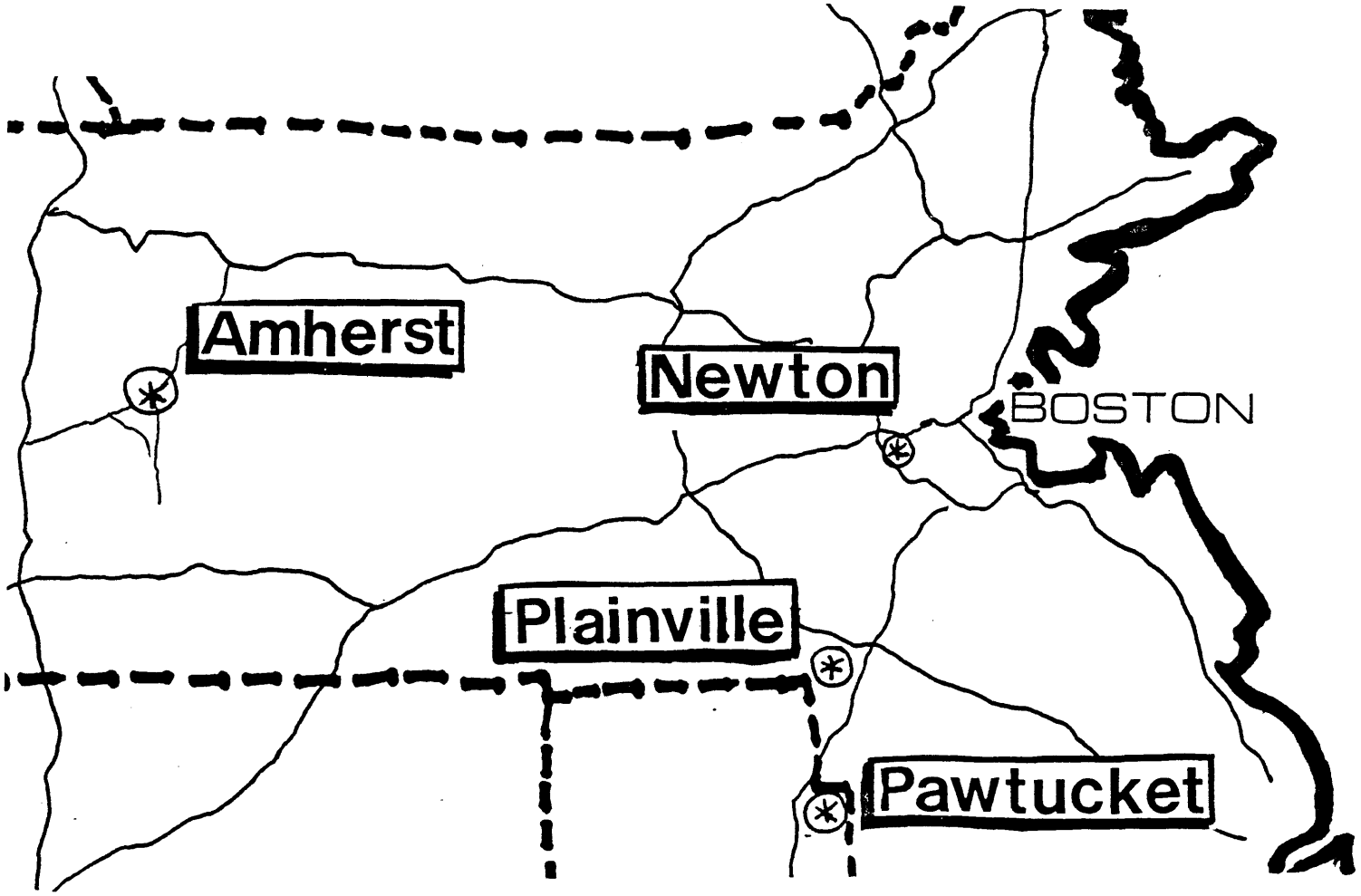
In order to look at a real planning situation, and test for any effects of or reactions to Nollan, I have chosen a case study format in which to carrying out this research. Through an initial literature review, I identified various themes and issues with respect to the case. Following the literature search, I conducted a series of interviews with experts in this field, either in law, planning, or both. As a result of this survey of experts, I further defined the research questions and goals, and began the four case studies.

1.3.1. Case Study Methodology:

Several characteristics are pivotal in characterizing a community: town or city, size of population, type of government, growth stance, development history, planning history, competency of professional staff and elected and appointed officials, education level of citizens, and level of aggressiveness in planning initiatives. With expert advice, four communities in the Massachusetts area were selected on which to focus. The study effort was limited to the general Massachusetts vincinity, simply due to commuting and time constraints. This imposed a bias to the studies, as planning history in New England varies significantly from other areas of the country. However, although this bias cannot be overcome,

it will be explained in section 1.5.

The Town of Amherst, Massachusetts is roughly two hours to the west of Boston; whereas, the City of Newton, Massachusetts is the neighboring community to the west; the City of Pawtucket, Rhode Island is about one hour southwest, directly east of and bordering on Providence, Rhode Island; and the Town of Plainville, Massachusetts is about 50 minutes south west of Boston, enroute to Providence.



I initially acquainted myself with each community through journal articles, newspaper citations, windshield surveys, and man-on-the-street interviews. After this initial knowledge of the town or city, I made contact with the planning department for an interview with the planning director or staff. Finally, I interviewed other players in the town, such as developers, elected or appointed officials, planning board members, real estate agents, attorneys, or merchants to further inform the studies.

As the cases progressed, there were several goals which guided the research: understand the planning infrastructure of the town or city; assess the development and growth pressures with which it is faced; guage the growth stance of the citizens; assess the political climate and history; and understand recent zoning actions.

Finally, I looked at various recent town or city actions, to determine if there was any vulnerability to a challenge based on Nollan. These conclusions are presented in Chapter Eight.

1.4. ORGANIZATION OF THE THESIS:

Chapter Two presents an introduction to the historical development of planning and the law. It includes the major land use cases of the Supreme Court over the twentieth century, and how these have shaped the practice of planning. Chapter Three provides an explanation of the Nollan case, and the controversies surrounding it in the literature. Chapters Four through Seven are the case studies. Each Chapter introduces the community, describes any relevant

background, and explains the planning infrastructure and reactions to Nollan. Finally, Chapter Eight presents some summary thoughts and conclusions to the research.

1.5. BIAS IN THE MASSACHUSETTS AND NEW ENGLAND CONTEXT:

As alluded to above, the case studies in no way pretend to be all-inclusive, or representative of planning in this country. There are some unique qualities about New England which must be included when discussing the relevance of this research. First, the New England area is the earliest-settled colonial region of this country. Towns have existed here for over three-hundred years. Long-standing family and traditional ties are quite influential in some local political issues. In addition, an aging infrastructure is beyond capacity, and there are long-standing patterns of development which began with and evolved around Colonial lifestyle and modes of transportation, not the twentieth century and the automobile.

Second, the small-town mentality in New England is also unique to this region. There are actually few cities in Massachusetts. The rest of the towns are governed by a various degrees of town-meeting form of government, either the traditional form which is held annually, and in which every citizen may vote, or a modified form or representative town meeting. This type of town government worked very well at its inception for small towns with relatively few issues, but is quite cumbersome for a large-sized town which faces very complicated and seemingly insurmountable regional pressures.

Besides the town-meeting form of government being cumbersome, there is also a mentality that towns are self-sufficient. Unfortunately, most modern issues such as waste disposal, water quality, and transportation do not respect town boundaries. There is a great reluctance in Massachusetts towns for cooperation with other, even neighboring towns. There are no political mechanisms, such as counties, townships, or parishes by which to coordinate regional activies. The regional planning network identifies and addresses this need for thinking and planning on a regional, not just local, or even neighborhood level. Regardless, many small, insulated towns are hesitant to become involved with regional planning efforts, and feel that regional planning agencies ignore and overlook local needs.

Finally, there is no real history of planning at all in New England. In accordance with the self-sufficient and insulated attitude of towns, most felt no need for professional staff, or long-term planning initiatives. Still today, in a global economy, Massachusetts towns are reluctant to acknowledge their interdependence or a need for shared knowledge. Most small towns still have no professional planning staff, or staff of any kind. As will be explained in Chapter Three, as the body of law becomes more and more extensive and complicated, there is an urgent need, particularily in such small towns, to investigate hiring some professional staff, as circuit planner, or more aggressive interaction with a regional planning agency.

1.6. REMARKS ON A CONCLUSION:

In the final chapter, I expand and generalize from the case studies, looking for some common patterns or themes, which could be lessons from which future research can begin, or from which others can learn.

While this is intended to be an academic paper, it is written from the point of view of a planner. I am interested in planning issues, and how planners can be better informed at their practice. I present a summary of the Nollan decision, but only to expound on all the issues raised in the case and the uncertainty which surrounds it in the literature. The summary in Chapter Three is intended as an introduction into the issues and questions raised surrounding the Nollan case. This thesis is intended to provide a look at the various reactions to these cases in regular towns and cities. I have attempted to represent the case fairly in this thesis, and to present the holdings in a satisfactory manner. It is important to remember that these cases are complex, and even the experts in the field nationwide are confused as to the actual holdings and conclusions from these two cases.

CHAPTER TWO: HISTORICAL DEVELOPMENT OF PLANNING AND THE LAW

2.1. INTRODUCTION:

"Governmental regulation--by definition--involves the adjustment of private rights for public benefit."[1] Over time, planning activities have been used to manage this tension between private rights and public benefit in America. These activities began with local elected or appointed boards, but have since developed into a professional practice. As planning theory and tradition evolves, the practice is educated and refined. In addition, "Land use regulation is set against a constitutional backdrop that established certain limits for such regulation."[2] It is controlled somewhat, and its boundaries are defined in the constitution, as interpreted by the United States Supreme Court.

Planning heavily relies upon the police power, as set forth in the United States Constitution. "The nature of the police power is no less than the inherent power of the government to regulate for the public good--a very open-ended and broad power. Because the measures which must be taken by the government to insure the public welfare change with the changing society, the scope of the police power has expanded substantially."[3]

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[1]Tribe, Laurence H. American Constitutional Law, Second Edition. Mineola, NY: The Foundation Press; 1988, p. 596.

[2]Smith, R. Martin, "Due Process: The Elements of Fair Play", in Netter, Edith, ed. Land Use Law: Issues for the Eighties. Washington, D.C.: APA Planners Press; 1981, p. 65.

[3]Netter, Edith M. and Daniel Barry. "Managing Growth Impacts in Massachusetts and the Limits of the Police Power", Center for Rural Massachusetts, University of Massachusetts, Amherst, January, 1988, p. 3.

In this chapter, I will highlight several of the landmark land use cases of the Supreme Court over time. This chapter is intended to serve as merely a backdrop to understanding the current state of planning and the law, and how the two have evolved. I do not intend to present a thorough analysis of these cases, but to describe the general intent and pattern which exists.

2.2. PLANNING THEORY AND THE LAW:

The Supreme Court has a great deal of control over the direction in which planning theory evolves. The theory is refined and explored by academics and professionals, and then occassionally tested as to its constitutionality. A great many cases having to do with land use and regulation are appealed as far as the Supreme Court. However, the Court agree to hear only a small portion of those. Most of those which are actually heard are dismissed or decided on procedural, not substantive issues.

As a result, not more than a dozen Supreme Court decisions in land use have come out of the last fifty or sixty years. Each of these has slightly altered the course of the profession. Most of the cases decided in the fifties through the seventies are liberal in nature, and give acquiescence to future practices. However, these most-recent cases, Nollan and First English, which are products of the

recent conservative tenor of the Supreme Court with three Reagan appointees, are seen by some as much more conservative and restrictive than any in the past.

2.3. SIGNIFICANT CASES IN THE EVOLUTION OF PLANNING:

The first major land use Supreme Court decision came in 1926 in Village of Euclid v. Ambler Realty Company. The Euclid zoning ordinance in question was adopted in 1922 by the Village Council. It "established a comprehensive zoning plan for regulating and restricting the location of trades, industries, apartment houses, two-family houses, single-family houses, the lot area to be build upon, the size and height of buildings, etc." The ordinance was challenged by the Ambler Realty Company, which had proposed to develop an industrial use in a prescribed residential district.

In the decision, the Court upheld the zoning ordinance as a valid exercise of a municipality's police power to protect the public health, safety, and welfare from nuisances. "The Court dramatically expanded the scope of the police power in Euclid, when it ... found that the ordinance was justified on a number of purely physical grounds, such as safety from fires and traffic, but also recognized that the segration of uses tended to 'preserve a more favorable environment in which to rear children'."[4] According to Justice Sutherland in the opinion of the Court, "a nuisance may be merely a right thing in the wrong place, like a pig in a parlor instead of the barnyard--even if the parlor has come to the pig rather than the other

way around."

Before immediately assuming that this case represents a sweeping judgment for planners to regulate private property in the name of the public good, one must consider that Justice Sutherland was considered a leading constitutional conservative. When the case was originally presented before the Court, Sutherland was with the majority which disagreed with the ordinance. However, as he was preparing the majority opinion, he was persuaded to have the case re-argued, whereupon he reversed his vote, and also the finding of the Court.

According to Sutherland's biographer, "Clearly, the statute was a novel exertion of political authority to curb individual freedom ... The opinion makes clear that Sutherland saw in the zoning act not the deprivation of property, but its enhancement ... It pointed out 'the line between what would be a clear invasion of right on the one hand, and regulations not lessening the value of the right' on the other. The result of the statute, then, was beneficial to property." Sutherland, therefore, was making a gesture towards protecting the institution of private property, in agreeing with a regulation which prohibited "nuisances".

After Euclid in 1926, the Court remained relatively silent on

[4]Netter and Barry, p. 4.

land use cases for nearly fifty years. During this time, planning progressed, and kept pace with developments in society, managing the increasing tension between private property and public benefit. During the 1950's and 1960's the federal government was sponsoring programs such as Urban Renewal and Model Cities. These programs involved promoting the public good, through vast changes and rehabilitation of "blighted" and "undesirable" sections of central cities. Through Urban Renewal, local city governments were given federal funds to design "better" plans for various districts and neighborhoods. Wherever existing structures and uses didn't conform to the new plan, through its eminent domain power as specified in the Constitution, the city had the explicit right to take control of the site, "justly compensate" the owner, and then demolish all existing structures.

2.4. THE FIFTIES: BERMAN V. PARKER:

In 1954, the Supreme Court ruled on Berman v. Parker, "upholding a statute authorizing goverment to take private property and sell it to private management to be redeveloped for improved private use."[5] It represents a "clear judicial endorsement of the exercise of the police power to achieve a broad range of objectives for the public welfare."[6] As Justice Douglas stated in the Court's opinion, "The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to

[5]Tribe, p. 590.
[6]Netter and Barry, p. 5.

determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."

The particular incedent in this case involved taking land for an Urban Renewal Plan in Washington D.C. In accordance with the Urban Renewal philosophy, and in particular with the plan for Washington D.C., an entire neighborhood was slated to be taken by eminant domain, and be completely demolished in favor of a better-planned neighborhood. Most of the area to be taken was indeed considered a ghetto, blighted, and run down. However, one land-owner objected to the taking of private property to be resold to another private owner who would "improve" it, in accordance with the Urban Renewal Plan. Upon appeal, the Supreme Court held that property could indeed be taken and destroyed, to make way for a new and better plan which "better" serves and addresses the name of the public good, even if it is only returned to another private land-owner.

2.5. PENN CENTRAL TRANSPORTATION COMPANY V. CITY OF NEW YORK:

The Court spoke again on a land use regulation issue in Penn Central Transportation Company v. City of New York. In this case, the Supreme Court upheld the decision of the New York Landmarks Preservation Commission to prohibit construction of an office tower over Grand Central Station. The landowner had the development potential as of right under existing zoning. The Court agreed that although private property, the Grand Central Station also affords a public benefit, and therefore must be protected (from its owners in

this case) and preserved for future public benefit. In fact, it is this public benefit which created such economic value on the parcel. "The upshot of Penn Central is that, when faced with a regulation which not only 1) advances some public interest, but also 2) falls short of destroying any classically recognized element of the bundle of property rights, 3) leaves much of the commercial value of the property untouched, and 4) includes at least some reciprocity of benefit, the Supreme Court is unlikely to find a taking."[7]

2.6. THE RECENT CASES:

The most recent voice of the Supreme Court to the planning community occurred in the summer of 1987. On June 9, 1987, the Court ruled in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles. The case involved a temporary moratorium on development in a flood plain in Los Angeles County which had recently been destroyed by a severe flood. The Church owned and operated a day camp which had been destroyed in the flood. The regulation forbade them from rebuilding the camp, throughout the duration of the moratorium. In the case, the Church charged that they were being denied all use of their land, and therefore should be compensated.

One commentator suggested that the case "is in some respects as notable for the issues it did not decide as for those it did".[8] The Court ruled that if a regulation amounts to a taking, the land-owner

[7]Tribe, p. 597.

[8]"The Taking Issue and Land Use Regulation: The Recent U.S. Supreme Court Decisions", Conference sponsored by Warner and Stackpole, Boston, September 11, 1987, p. 6.

must be compensated. However, it said nothing to clarify whether the situation amounted to a taking, or what standards might be used to judge whether a regulation amounts to a taking. Some suggest that this case was just an opportunity for the Court to address some issues in land use regulation about which it was concerned. Jack White, counsel for the County of Los Angeles in First English, "describes how the case got to the high court on what he terms a 'procedural quirk'; evidence that his case was merely an appeal of opportunity for the Court to unload on issues needing voice by the high court."[9]

The Court ruled in Nollan v. California Coastal Commission (which is discussed in more detail in Chapter Three) on June 26, 1987. In this case, the Court held that if there is no public purpose in a government regulation, it is a taking. It is concerned with the important link between regulatory programs and conditions imposed in permits. The Court articulated that this relationship is significant, and if the essential "nexus" is missing, the regulation is a plan of extortion, or a taking.

Some conclude that after the past history of cases which supported land regulation techniques, these two cases, First English and Nollan show "glimmerings of a gradual shift in philosophy on the Court ... recent rulings indicate that the Court is concerned that government entities have been overstepping constitutional bounds in regulating property rights."[10] Nollan and First English may be

[9]Ritchie, Robert W. "Planning to Avoid Trouble in Munincipal Land Use Regulations". Massachusetts City Solicitors and Town Counsel Association, 1987, p. 6.

indicative of both a shift in philosophy of the Court towards a more conservative tenor, and also a trend in land use regulation to impose fees and exactions in order to shift the burden of funding government services and programs to developers.

A regulation which is too restrictive and is considered a taking is not a new judicial development. In 1922, Oliver Wendell Holmes stated that "if a regulation goes too far, it will be recognized as a taking". What is new is that "under First English, such takings can be temporary and can include damages among available remedies; and under Nollan, such takings will be recognized if the essential nexus test is not met."[11]

2.7. CONCLUSION

In a dissent to First English, Justice Stevens predicts, "One thing is certain. The Court's decision today will generate a great deal of litigation. Most of it, I believe, will be unproductive. The mere duty to defend the actions that today's decision will spawn will undoubtably have a significant adverse impact on the land-use regulatory process." Many commentators agree that both of these cases have some judicial history to be written. Before that is achieved, how will the planning practice respond? What is the best way to proceed with planning in the wake of these two cases, and before any

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(continued from previous page)

[10]Guskind, Robert. "Takings Stir Up a Storm", Planning, September, 1987, p. 6.

[11]Ritchie, p. 1.

others have been handed down to further clarify these rulings? How can planning professionals, or elected municipal boards be expected to proceed without breaching any future holdings on these issues, even if "the country's leading experts in land use law candidly admit that they do not really understand the Nollan decision"?[12]

The purpose of this thesis is to investigate how these local planners and municipal boards are responding to the cases, how they perceive that they are affected by the rulings, and how they are attempting to cope with the current ambiguities in the law.

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[12]Ritchie, p. 3.

CHAPTER THREE: NOLLAN V. THE CALIFORNIA COASTAL COMMISSION

3.1 INTRODUCTION:

"Headlines in June 1987 triggered celebration among developers and commiseration among board members. Newspapers gave us headlines such as, 'High Court's Rulings Worry Planners'; 'Boards Rethink Recent Moratorium'; 'Rezoning Proposals May Be Shelved'; and 'New Rules Change Land Use Powers'."[1]

"This summer's two Supreme Court land use decisions may not be as lopsided as some experts had feared."[2]

Obviously, these two cases have caused some uneasiness among municipal officials, planners, and anyone associated with land use regulation. This uneasiness is due to the ambiguities in the holdings, and the resulting quandry of the normal experts. It is for both of these reasons that judges and commentators have predicted a "chilling effect" on planning. The Nollan case is very complex, and even the leading experts have been reluctant to reach any decisive resolution on the holding.

In this chapter, I set out my understanding of the case, which has been informed by many experts and commentaries. I then represent the obvious discord and opposition in the field, among the experts,

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[1]McGregor, Gregory I. "Local Environmental Law, Land Use Control, and Limits to Governmental Power", Prepared for the Massachusetts Munincipal Association, by McGregor, Shea, and Doliner, Boston, 1987, p. 1.

[2]Guskind, Robert. "Takings Stir Up a Storm", Planning, September, 1987, p. 1.

and even among the Supreme Court Justices. This case is quite complicated, and the goal of this chapter is not to put forth an exhaustive legal analysis, but to familiarize the reader with the obscurities and controversies surrounding the case.

3.2 BACKGROUND TO THE CASE:

The Nollan controversy began in the State of California in the early 1980's. California at this time was under the restriction of Proposition 13, which is similar to tax caps initiated in many states around the country. During the 1970's, many Americans became disillusioned with extravagant government spending, both on the local and federal level. As a result, many states enacted tax cap referendums which limited government spending to a certain prescribed level, with allowable incremental increases each year. Proposition 13 in California limits tax revenues, and also requires a public vote to over-ride the cap on increases in taxes.

A second contextual item is the issue of land regulation in California. Again in the 1970's, many Californians became aware of the possibility of disappearing and destroyed natural resources. As a result, many resource protection laws were enacted, designed to protect the natural environment in California. Agencies and restrictions were created, designed to monitor development processes and to impose protective measures. These sometimes-severe land use restrictions have afforded California the reputation for the most

stringent land regulation initiatives in this country.

This is an important backdrop to the issues at hand in California. The government, forbidden from their habitual action of freely increasing taxes to achieve governmental goals, was forced to look to alternative means of raising revenues and achieving government objectives. On the other hand, there are a myriad of government agencies, who are under these same spending limits, which are mandated to enforce the strictest land use and environmental protection initiatives in the country. Chicago attorney, Brian Blaesser describes this dilemma facing governments throughout the country: "Local governments must accommodate growth, while at the same time preserving their community's character and must do it all without much federal revenue."[3]

As a result, many agencies throughout California have begun imposing broad linkage fees and exactions which shift the cost of funding government services and programs to developers, which are usually perceived to have "deeper pockets". In fact, "it's no accident that so many crucial land-use cases have percolated up to the federal judiciary from California. Since the 1970's, California voters and officials have enacted progressively stricter land-use regulations, growth controls, and development conditions".[4]

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[3]Guskind, Robert, p. 9.
[4]Brian Blaesser, in Guskind, Robert, p. 9.

3.2.1. The California Coastal Commission:

Among these regulating agencies in California is the California Coastal Commission. The Commission was created under the Coastal Act, which was approved by California voters in 1972. This act involved a coastal plan for the 1,000 mile coastline of California, including detailed land-use regulations and permit conditions. The Commission was given the responsibility of protecting the State's coastline, with specific authorization to increase public access to the coast, and to restrict commercial as well as residential development. In short, the Commission had jurisdiction to protect and control activity along the entire coast. In doing so, it was protecting and defending the public interest in California's coastline.

Since its inception in 1972, the Coastal Commission has acted in accordance with its long-term plan to create and preserve public use of California beaches. It had established many public beaches, and also retained conditions on others to achieve some sort of conditional public use. Specifically, by the early 1980's, in an unincorporated part of Ventura County in Southern California, the Coastal Commission had established several public beaches, spaced by a few miles with private land between. It had begun to provide public access connecting these two public areas through private property on the coastline.

According to State Law, the entire coast is public land up to

the high water mark in California. In addition to this pulic land, the Coastal Commission was creating a public easement up to ten feet wide above this traditional property line. One way to achieve this could have been through the power of eminent domain, and "take" the desired easement, and then compensate the land-owner for the land's fair market value.

However, as stated above, the government agencies in California were operating under spending limitations. To achieve their desired objectives yet remain within budget constraints, the Coastal Commission (and other government agencies) naturally looked to those who were more able to provide funds which could support such government programs. They designed a policy whereby the issuance of a building permit along the coast was conditional upon the provision of an easement by means of a deed restriction. This condition applied to all applications for building permits which involved at least a 10% increase in total liveable square footage.

3.2.2. Local Context:

J. Patrick and Marilyn Nollan had been renting a 521 square-foot bungalow on beachfront property in Ventura County. Along this stretch of beach, the Coastal Commission was working to establish public access between Faria Beach County Park, one-quarter mile north of the property, and Solimar Beach, one-third mile south. The Nollans acquired an option to buy the property, under the condition that they would demolish the bungalow and construct a larger, two-story home of 2464 square-feet. Since 1979, forty-three other neighbors of the

Nollans had already done the same, converting small rental cottages into larger, year-round dwellings. In doing so, they had all followed the Coastal Commission process and had deeded an easement as public land across their property to the Coastal Commission, as a condition of being issued a building permit.

The Nollans, however, objected to such a condition, and challenged the Commission in court, saying that their land was being taken by the State without any just compensation, as guaranteed in the Fifth Ammendment of the United States Constitution.[5] The Coastal Commission argued that exacting the easements was a legitimate use of the "police power" to protect the public interest. They contended that the easement requirement was necessary to ease public access along the beach which was being hindered due to the psychological barrier of increased density of development along the coast. The Commission claimed that coastal development was "creating a wall separating the people of California from the state's tidelands".

A California Court agreed with the Commission, and held that the conditions were "reasonably related" to state planning objectives. The Nollans appealed to the United States Supreme Court, which agreed to hear the case. The Supreme Court, on June 26, 1987 ruled in a five-four decision in favor of the Nollans. The majority decision was written by the recent Reagan appointee to the Court, Justice Antonin

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[5]The Fifth Amendment to the United States Constition provides that: "No person shall be ... deprived of ... property, withoug due process or law; nor shall private property be taken for public use without just compensation".

Scalia, while three of the four dissenters wrote separate dissenting opinions.

3.3 THE DECISION OF THE UNITED STATES SUPREME COURT:

The Court considered the spirit of the Fifth Amendment, and at what point regulation can be deemed a taking. "We view the Fifth Amendment's property clause to be more than a pleading requirement, [and] compliance with it to be more than an exercise in cleverness and imagination." The Court found that the easement condition was unconstitutional, because it was not directly related to the reasons for which the permit could have been denied, nor was there a direct connection between the condition and the problems or burdens being created by the new development.

In the decision, the Court focused on this relationship of the condition of the building permit to the authority and the government objective: "Given, then, that the required uncompensated conveyance of the easement outright would violate the Fourtheenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land use permit alters the outcome. We have long recognized that land use regulation does not effect a taking it if 'substantially advance[s] legitimate state interests' and does not den[y] an owner economically viable use of his land."

Elaborating further on the connection between the condition and

the governmental objective, the Court continued: "The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When the essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute one-hundred dollars to the State Treasury ... Similarily here, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was."

In other words, the Coastal Commission had the authority to deny permit applications which would visually impair lateral access to the beach. Granting a permit provided the owner allows public access on an easement parallel to the beach does nothing to improve lateral visual or physical access, in which case, the "essential nexus" is eliminated.

The Court agreed with the Nollans that the conditional requirement of a lateral easement across the property was unconstitutional. The majority opinion did, however, concur with the Coastal Commission's belief that a continuous strip of publicly accessible beach along the coast is in the public interest. "The Commission may well be right that public access is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its 'comprehensive' program, if it

wishes, by using its powers of eminent domain for this 'public purpose' but, if it wants an easement across the Nollans' property, it must pay for it."

Justice William Brennan vigorously dissented, saying, "They [the California Coastal Commission] should be encouraged to regulate development in the context of the overall balance of competing uses of the shoreline. The Court today does precisely the opposite, overruling an eminently reasonable exercise of an expert state agency's judgement, substituting its own narrow view of how this balance should be struck." He argued that the decision was "insisting on a precise accounting system which is insenstive to the fact that increasing intensity of development in many areas calls for far-sighted comprehensive planning".

Justice Stevens, in his dissent, describes his view of the disagreement between Brennan and the majority: "I write today to identify the severe tension between the dramatic development in the law and the view expressed by Justice Brennan's dissent in this case that the public interest is served by encouraging state agencies to exercise considerable flexibility in responding to private desires for development in a way that threatens the preservation of public resources." Each of these dissenters seems quite concerned with allowing a certain amount of local discretion to a municipality, to be creative, and to consider the needs and goals of its community collectively.

Several observations are significant here. First, it is quite unusual for the United States Supreme Court to agree to hear a land use case. Therefore, when the Court did agree to hear a case such as First English which involved land use issues, the "planning community definitely [took] note".[6] The Nollan decision was announced just three weeks after this monumental land use case. These two cases combined are much more significant than either one alone, as explained in Chapter Two.

Second, the Nollan decision was not given much media or public attention, because "the dust was still settling" from the First English decision. In addition, it was announced the same day as the retirement of Associate Justice Lewis F. Powell. It wasn't until late August and September that the groundswell of concern prompted professional organizations and individuals began to investigate the full, combined extent of both of these rulings. Some of these initial reactions, and also secondary analyses will be discussed in Section 3.4.

3.3.1. The "Nexus" Requirement:

The "nexus requirement" as explained in the Nollan case states that conditions to approvals must be functionally related to the grounds upon which the agency or government body could have disapproved the request. "In short, unless the permit condition serves the same governmental purpose as the development ban, the

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[6]Guskind, Robert, p. 5.

building restriction is not a valid regulation of land use, but an out-and-out plan of extortion." If such a nexus does not exist, the regulation or requirement is actually an "illegitimate exercise of the police power ... with no reasonable relationship between the effect of the development and the condition imposed."

The holding in the Nollan case relates to the constitutional question of the police power of a government body, relative to the rights of a property owner. The Court began the opinion stating, "We have repeatedly held that, as to property reserved by its owner for private use, 'the right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property'." It then proceeded to explain that any infringement on this right, or attempt by government to regulate this particular "stick" would be more critically scrutinized and more-likely determined a taking.

If the government is going to infringe on this "stick", there must be a direct relationship and connection, a "nexus", between the regulation and a burden created by a development in order for the public interest clause to be satisfied. In other words, permit conditions, such as the one requiring a public easement in exchange for a building permit from the California Coastal Commission, must be directly related to the burden created by the particular development.

Justice Brennan had his own opinion of the nexus requirement: "The Court's insistence on a precise fit between the forms of burden

and condition on each individual parcel along the California coast would penalize the Commission for its flexibility, hampering the ability to fulfill its public trust mandate." Justice Blackmun also agreed with Justice Brennan: "I disagree with the Court's rigid interpretation of the necessary correlation between a burden created by development and a condition imposed pursuant to the State's police power to mitigate that burden ... The land use problems this country faces require creative solutions. These are not advanced by an 'eye for an eye' mentality."

3.3.2. Footnote Three: The Substantially-Related Dilemma:

Justice Scalia, in the majority opinion, explains the nexus requirement. "Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter." Then, hidden in a footnote, Justice Scalia continues to describe these terms: "To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, not that the 'State could rationally have decided' that the measure adopted might achieve the State's objective."

On the surface, the difference between "substantially-advancing" and "could rationally have decided ... might achieve" seems to be semantics. However, the Justices seem especially deliberate.

In the latter part of the decision, Justice Scalia again refers to this requirement: "As indicated earlier, our cases describe the condition for 'substantial advanc[ing]' of a legitimate State interest. We are inclined to be particularily careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is a heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." Here, Justice Scalia alludes to the fact that municipalities are stretching land use regulations until they are challenged and revoked, and in turn beguiling property owners.

The dissenters are also greatly concerned with this emphasis on choice of adjectives. Justice Brennan dwells on this issue in his dissent for some time. "The first problem with this conclusion is that the Court imposes a standard of precision for the exercise of a State's police power that has been discredited for the better part of this century ... It is also by now commonplace that this Court's review of the rationality of a State's exercise of its police power demands only that the State '<u>could rationally have decided</u>' that the measures adopted might achieve the State's objective ... Such a narrow conception of rationality, however, has long since been discredited as a judicial arrogation of legislative authority. 'To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of government'."

He obviously feels quite strongly that the benefit of the doubt should be left with the State, rather than the State having the burden of proving that the regulation is legitimate.

Justice Brennan concludes, the Court's "reasoning is hardly suited to the complex reality of natural resource protection in the twentieth century ... I can only hope that today's decision is an aberration, and that a broader vision ultimately prevails." Justice Stevens adds, "Even if his [Justice Brennan's] position prevailed in this case, however, it would be of little solace to land use planners who would still be left guessing about how the Court will react to the next case, and the one after that."

3.4. IMPACTS OF THE DECISIONS ON PLANNING IN GENERAL:

The impacts of this decision on the planning practice, and the governmental power to regulate land use are far-reaching. Since the beginning of this century, governments have been attempting to control and direct growth through regulating land use, to varying degrees. Justice Brennan asserts in his dissent that "there can be no dispute that the police power of the States encompasses the authority to impose conditions on private development." In the past few years, many regions, especially in the south and west which have never had the occasion to impose conditions on local development, have experienced tremendous growth pressures. Almost in a panic, these areas find themselves scrambling for effective methods and tools to control and manage growth.

In such areas which have been in the practice of imposing strict land-use controls without establishing any rationale or consistency with a long-term plan, the Nollan decision will be felt most seriously. The case will have significant impacts in California, with the most stringent regulations, and also a body of state law which has distinctly favored local governments, particularily with respect to the taking issues over time.[7]

The holdings will also be felt in any burgeoning metropolitan area which has been trying to cope with rapid growth. Especially in regions which have never experienced any sort of growth or development pressures but are currently being overwhelmed with development proposals, there is a much greater tendency to arbitrarily adopt strict regulations from another area, without any study as to the relevance to the specific region or town. In this case, if the regulation does not have any relation to the current or stated planning objectives, it could likely be infringing on constitutional rights, as spelled out in Nollan.

Second, many commentators feel that the most extreme forms of growth management, such as linkage programs or inclusionary zoning requirements, are especially vulnerable to challenges based on Nollan. At risk among linkage practices are requirements of contributing to off-site projects, such as schools or parks, or special government

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[7]Guskind, Robert, p. 8.

agencies which are set up to hold money collected from all developments within the city. Douglas Porter, director of development polich research at the Urban Land Institute explains that "linkage programs are at the outer extreme of the exaction process in terms of what is demanded and how directly connected it is to the development".[8]

Finally, for everyone who is related to the development and land use regulation process, the Nollan case casts some doubts on traditional government power to change zonings and to regulate land uses. Michael Berger, council for the plaintiff in First English, and author of an amicus brief in Nollan "sounds a warning to those who would say that nothing has changed, that it is 'business as usual' for planners and municipal regulators. A shot has been fired across the bow by the Supreme Court, and only the foolish will act with that breadth of unchecked discretion fostered by decades without challenge. Nothing has changed, and yet everything has changed."

3.5. RESPONSES TO THE CASES:

Through a survey of the various commentaries on this case, I have identified four major impacts of the Nollan decision, in addition to the initial reactions. First, there is concern over the psychological impact this case has and will continue to have on the professionals and landowners in communities. Second, the case seems to spell out a "new standard" to which land regulators must adhere.

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[8]Guskind, Robert, p. 8.

Third, the balance in the relationship between the development and planning communities, whatever that was before, or however that varies regionally, seems to have shifted somewhat towards the developer. Finally, because of the new, or at least stricter, standard, in addition to other ambiguities in the case, there will be an increased need and demand for more sophistication in planning and analysis.

3.5.1. Initial Reactions:

Immediately after the decision, many began speculating exactly what the case means to current practices in planning. By September 1987, many trade magazines, professional organizations, and local interest groups were giving their opinions as to the far-reaching effects of the case. Many more groups and individuals were also sponsoring conferences directed at certain groups, planners, developers, builders, lawyers, or elected government officials, to help them understand Nollan with respect to more specific interests and activities.

Planning magazine, a publication of the American Planning Association, explains that the decision initially seemed to "confirm the worst fears of planners and local officials, who saw them as severely hampering a range of practices."[9] In a brief prepared for the Massachusetts Municipal Association, Boston attorney Gregory I. McGregor explained that "headlines in June 1987 triggered celebration among developers and commiseration among board members."[10]

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[9]Guskind, Robert, p. 5.
[10]McGregor, Gregory I., Esq. "Local Environmental Law, Land Use

However, after the initial "hysteria" wore off and professionals began to really look at the holdings in the case, there was a sense that maybe the ruling wasn't quite as severe with respect to planning tools used nationwide to control development, as was initially suspected. According to Blaesser, the 'heightened reaction' to these two cases has not been merited. These decisions don't end the ability of local government to devise and implement sophisticated regulations. It remains in their grasp to fashion responses to the opinions without having to go backward in time to an earlier era of less-sophisticated regulations."[11]

3.5.2. Psychological Impact:

"At a minimum most legal and planning experts agree that until further litigation clarifies the issue the First English and Nollan rulings raised but did not fully answer, their psychological impact is bound to inhibit state and local governments".[12]

It is agreed that further litigation is necessary to expound upon and to clarify issues which the case raised, but did not adequately respond to. Meanwhile, the initial scare has not worn off of communities. In particular, a small community with little or no experienced staff is vulnerable to challenges by a developer. In such

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Control, and Limits to Governmental Power". McGregor, Shea, and Doliner; Boston, MA. 1987. p. 2.

[11]Guskind, Robert, p. 6.

[12]Guskind, Robert, p. 6.

a case, the town would be financially paralyzed and dried out by any legal actions. Some communities which are not particularily aggressive or adventurous in their planning mechanisms may prefer to "put everything on hold" for a while, until the issues are spelled out further, rather than unknowingly impose a restriction which violates the holding of Nollan, or other future decisions.

Bill Picard, Planner in Worcester, Massachusetts and coordinator of the New England APA chapter's conference, "The Supreme Court Rulings and the Future of Planning and Growth Management", noticed that, "most smaller towns are quaking in their boots". Those which could afford the time or the personnel sent representatives to conferences to understand what the decisions really mean in the abstract, and to local towns.

3.5.3. A "New" Standard?

Some of the confusion of Nollan comes from the ambiguity of a "new" or stricter standard for governments imposing exactions on development. The language in the case seems to indicate that a regulation must be shown to substantially advance a legitimate state interest. Previously, most regulators, attorneys, and courts alike had assumed that conceivably related to a reasonable state interest was sufficient to pass constitutional muster. Although the difference may seem trivial, the underlying philosophy seems to indicate that the Court is sceptical of supposed "good faith" efforts of a governmental body, and sees a need to impose some requirement of rationality, rather than assume it will happen naturally.

The dilemma is expressed clearly by Robert Ritchie, Town Counsel to Amherst, Massachusetts: "Is there a new standard operating, or is the old standard now being more actively invoked by the courts?"[13] Some commentators believe that the language in the footnote implies that "this new test will be applied to all takings cases".[14] According to Jerold Kayden, "Nollan says the courts could use a higher level of scrutiny than that which land-use lawyers have assumed for the last fifty years should be employed."[15]

The APA Planning and Law Division produced an opinion on the two recent cases, and was equally concerned and uncertain about the "new standard": "Even more troubling is the apparent standard adopted by the Court. While it is not absolutely clear that the Court's discussion articulated a new standard in land use law, or is merely dicta, the Court seems to have expressly rejected the concept of a rational relationship between the condition and the governmental objective."[16]

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[13]Robert W. Ritchie, "Planning To Avoid Trouble in Munincipal Land Use Regulations". Massachusetts City Solicitors and Town Counsel Association; 1987, p. 5.

[14]"The Taking Issue and Land Use Regulation: The Recent U. S. Supreme Court Decisions". Conference sponsored by Warner and Stackpole, Boston, September 11, 1987, p. 2.

[15]Guskind, Robert, p. 8.

[16]Merriam, Dwight, Brian Blaesser, Fred Bosselman, Dave Brower. "Commentary on First English Evangelical Lutheran Church v. County of Los Angeles, California, U. S. Supreme Court Decided June 9, 1987, and Nollan v. California Coastal Commission, U. S. Supreme Court, Decided June 26, 1987". APA Planning and Law Division, Chicago, IL, July 1987, pp. 9-10.

Whatever adjective will be used by state courts in future cases, whether "conceivably related", "reasonably related", or "substantially advancing", experts are advising communities to protect themselves by backing up regulations with intensive and detailed plans and planning objectives. Once a regulation is designed, there will be further need to obtain a legal opinion as to whether the regulation is within the bounds of Nollan. Warner and Stackpole warn that "the Court raised the standard by which government action must be measured to ensure its legality. These cases make the process of land use planning and zoning more challenging than it was just six months ago."[17]

3.5.4. An Altered Balance Between Government and Developer?

"The heart of the taking analysis is a balancing test in which the court weighs private property interests against public health and safety interests."[18] Because the Nollan case presumably calls for some stricter standard to be used in judging the legitimacy of land use regulations, some believe that it alters this balance. Justice Brennan stresses this point in his dissent: "The Court has, in short, given appellants [the Nollans'] a windfall at the expense of the public." Many commentators conclude that the sensitive balance between regulation and property rights has been somehow altered. "The power relationships between the community and the developers are more equalized than they were before, and that will have profound implications for land use."[19] The McGregor opinion states that:

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[17]Warner and Stackpole, p. 1.
[18]David Caylor, City Attorney for El Paso, TX, in Ritchie, p. 8.

"Recent United States Supreme Court decisions on control of real estate development are thought by some to tip the balance in favor of development."[20]

Even if this balance has been altered, some argue that it was necessary. According to Michael Berger, "the two cases ... do not represent nirvana for property owners. Neither are they nuclear winter for land use regulation. They do, however, represent a clear signal that the regulatory process has gotten badly out of balance and was in need of redress."[21]

Others defend the opinion, stating that these rights and this balance has always existed in the Constitution, but this case has just forced the Supreme Court to spell it out more clearly. "The foundation of local land use and environmental laws has been left intact. The nature of governmental authority and the countervailing rights of those who are regulated, however, have been made much more clear."[22]

Finally, whether the balance has been altered in favor of the developer, it is merely being stated for those who had abused it, or whether it has not changed, the public perceives that something has happened, and that will definitely affect how negotiations,

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[19]Donald Conners, attorney with Choate, Hall and Stewart in Boston, in Guskind, Robert, p. 6.

[20]McGregor, p. 1.

[21]Michael Berger, in Ritchie, p. 6.

[22]McGregor, p.1.

developments, and regulations occur in the near future. For example, several commentators believe that negotiated development will become more attractive after Nollan. One reason is that these cannot be attacked under Nollan, because nothing is exacted by the regulating authority, without it being agreed to by both the authority and the developer. According to Gus Bauman, Chief Litigation Counsel of the National Association of Home Builders, "I think we will have more negotiations between government and developers, because both sides have cause to act reasonably."[23]

One result of this perceived difference is that the burden of proof has shifted towards the regulator. "In sum, the Court has established a stricter standard of review for takings cases. The local government action is no longer presumed valid. Instead, it will be up to the local government to prove that there is a substantial relationship between its actions and the purpose it is seeking to achieve."[24] In other words, no longer can the government regulate, assuming that restrictions are "reasonably related" to a "reasonable public interest".

A government must be cautious to keep careful records, and be prepared to defend any actions as based on a "legitimate state interest", and "substantially advancing" of it. The burden is not only to provide a public interest, but also to show that the means

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[23]"Builders Told of Court Effect on Properties", St. Louis Post Dispatch, February 18, 1988.

[24]Warner and Stackpole, p. 2.

chosen in a particular regulation or exaction are substantially related to advancing this legitimate state interest. And if not, the authority must pay the significant price of not only loosing the regulation, but also compensating the property owners, as a result of the First English decision.

To accomplish this, one commentator predicts that an increased reliance on impact studies to document any nexus between a burden of a development and the corresponding exaction required by the regulator will result in the emergence of "green eyeshade planning", with a "new cader of planning-slash-accountants conducting statistical studies to find these direct links."[25]

3.5.5. Increased Need For Planning and Professionalism:

In general, the consensus among attorneys and planners alike is that there will be "an increased need for more planning, both in the development of regulations and in the project review and approval process."[26] For practicing planners, "basically, planners have to do better planning. If you're going to make rules, you must use common sense, and be technically correct. In other words, you can't mix apples and oranges."[27]

In short, additional care will need to be given, on the part of

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[25]Guskind, Robert, p. 9.

[26]Blaesser, et al, in APA Planning and Law Division newsletter, July, 1987, p. 11.

[27]Telephone interview with Bill Picard, Planner for Worcester, Massachusetts, 3-22-88.

the planner, as well as the municipal boards, to "think through their planning objectives and to be accountable for the impacts of restrictions on landowners. Local boards can expect a higher level of court scrutiny on the purposes they invoke and the limitations they impose."[28]

At least in Massachusetts, Boston attorney Joel Bard indicated that careful planning practices should be able to continue, because, relative to the rest of the country, not many communities were being overly aggressive. In general, Massachusetts by-laws are fairly conservative.[29] Finally, there is now more than ever a good reason to become involved in regional planning or circuit planner activities, especially for smaller towns.

3.6. CONCLUDING REMARKS AND UNCERTAINTIES ABOUT NOLLAN:

"The country's leading experts in land use law now candidly admit that they do not really understand the Nollan decision ... To assist you as municipal officials or counsel to municipal officials at this time is much like being a tour guide in an unexplored cave. But, we must begin."[30]

Most advisors are recommending caution, in this interim stage while lawyers grapple with the implications of this case. Most also stress the importance of continued planning, and avoiding any planning

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[28]McGregor, p. 17.
[29]Telephone interview with Joel Bard, 3-23-88.
[30]Ritchie, p. 3.

paralysis as a result of the preceived impacts of Nollan. Attorney Jack White, counsel for the County of Los Angeles in First English, "counsels balance in the immediate future while the judicial dust settles on local planning offices, urging planners to be more circumspect about the consequences of their actions, but at the same time they should guard against becoming overly cautious."[31]

The most important thing while waiting for the future judicial history of these two cases to be written, seems to be seeking the advise of competent counsel, who can analyze the cases, and apply them locally. This will be difficult, to be careful not to breach the holdings on these two cases, and also to anticipate the direction of the courts in the future, and avoid breaching the holdings of future cases on this "changing boundaries of permissible use regulation".[32]

Finally, this will be most difficult for small towns. According to Robert Ritchie, "constitutional law-makers have created a devastating body of law which small towns simply cannot cope with."[33] The following chapters explore this question in several towns and cities in the Massachusetts area, to determine the reactions of various types of communities, and the mechanisms or procedures which have arisen by which the municipalities are coping with this new chapter in land use regulation.

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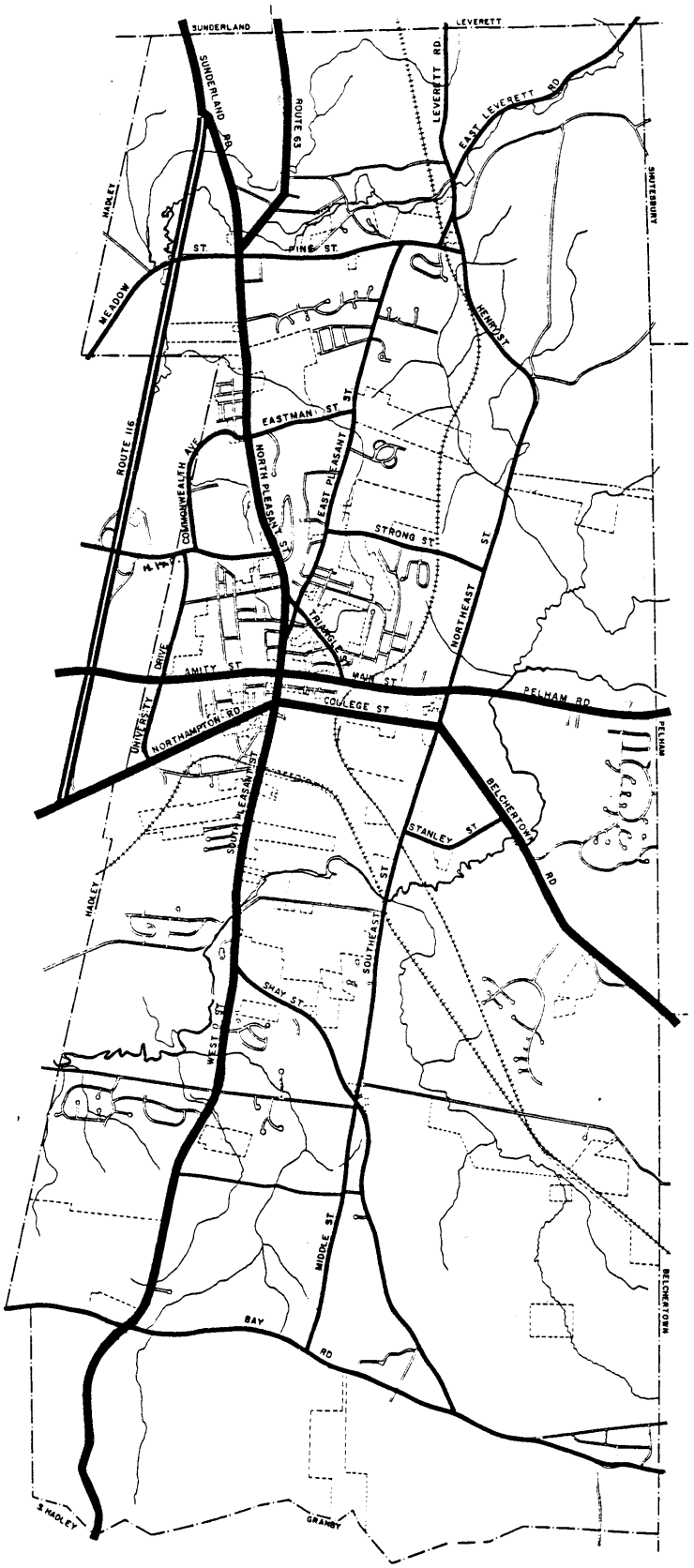
[31]Ritchie, p. 7.
[32]Ritchie, p. 10.
[33]Telephone interview with Robert Ritchie, 3-16-88.

CHAPTER FOUR: A M H E R S T, M A S S A C H U S E T T S



4.1. INTRODUCTION:

The Town of Amherst is located in Western Massachusetts, in the scenic Lower Pioneer Valley. Even though it is not adjacent to any major regional routes, it has been affected by state-wide growth pressures, particularily in housing, and has also shared in the recent economic prosperity. The town center is located on the intersection of Routes 9 and 116. Metropolitan areas near Amherst include Northampton, which is located roughly ten miles west of Amherst, and the Holyoke, Springfield, and Chicopee area, about twenty-five miles southwest of Amherst, while Hartford, CT is roughly one-hour to the south. (See Figure 2.)

4.2. HISTORICAL DEVELOPMENT:

Amherst has historically been an agricultural community, augmented by educational institutions, such as the University of Massachusetts at Amherst (UMass) and Amherst College. Hadley, the town which borders Amherst on the west, has the best soil in the state for agriculture, and thus neighboring Amherst has always enjoyed excellent farming conditions as well. The town seal, which shows a book and plow, graphically represents this traditional partnership between education and agriculture in Amherst.

Until the 1960's, each of the educational institutions was self-contained, with only several thousand students each, and complemented the nature and character of the Town. By the early 1960's, UMass began to grow and expand astronomically, threatening and ignoring the town character. In just over ten years, the University's

population had skyrocketed from under 10,000 to over 25,000. With a population larger than the Town of Amherst itself, the University was experiencing growing pains, which obviously spread to and infringed upon the Town.

Being a state school, the University was expanding under legislative approval, and presumed that this took precedent over any town or home-rule concerns. Even though the campus is in a valley away from the high point of the town center, it is impossible for the town and the University to co-exist, independently of one another. Despite the construction of five high-rise dormatories, the University was unable to house its own students, which put increased pressure on the local housing market.

As the University expanded, it encroached upon agricultural land and open space. The Town of Amherst, besides being concerned about the loss of farmland and open space, was also concerned about increased institutional land use, which derive no taxes for the Town. As the expansion continued, a rift began to grow between the University and the Town, destroying the traditional relationship and neighborly association which had historically existed. Today, however, since the expansion has stopped at an enrollment of 26,000 as a policy choice, the University and the Town are once again beginning to communicate and cooperate in terms of planning and development.

4.3. UNIQUE INFLUENCE OF THE EDUCATIONAL INSTITUTIONS:

Amherst College is located right at the town center. Its

classic buildings and stately campus reinforce the town character and the image of quality educational activities. The University of Massachusetts is located on the back side of a hill from the town center, and is spreading out into the valley beyond. Its buildings are much more modern, with not much contiunity of design or planning.

There is more besides the physical presence of the universities which creates a unique atmosphere in the Town. Amherst has always been a relatively liberal and progressive town, due to this academic environment. Educational institutions tend to have a "liberalizing" influence in general. This liberal attitude spreads to the townspeople of Amherst, most of whom are associated with the universities in some way, either through education, employment, or providing services. The increased educational level, particularily relative to other small towns in western Massachusetts also affords a sense of social consciousness and refinement.

4.4. AMHERST TODAY:

Today, Amherst is a very desirable place in which to live, located in a very scenic and as yet untainted area of Massachusetts and also New England. It is unique in that it has all the quaint ammenities of a small town, and yet more open-mindedness due to the influence of the educational institutions. Many students who attend college in the area decide to settle there due to the surroundings. Others leave the region in search of a professional job, but soon return.

Today, the Town Planner cites an increasing interest in Amherst as a place to retire, especially among Amherst university-alumnis. The Town just this year approved their first retirement village. For those students who stay in Amherst after graduation, jobs are not scarce. UMass, the largest employer in western Massachusetts provides over 8,000 jobs. In addition to this, there is an abundance of service and retail jobs. The Town also notes a significant artist population in the valley area, probably the largest in Massachusetts, according to the Town Planner.

Even though the soils are still very good for agricultural uses, farming is no longer profitable. The next generation of farmers is not interested in farming, and the older generation of farmers is being pressured into selling out to subdivision developers. To protect these farmers and also the town character, Amherst is very active in using State programs and local initiatives to buy up this valuable land and preserve it as open space. Many local residents are very concerned about local land which has been open, wooded, or farmed forever, being snapped up and developed into high-priced housing.

A prevalent issue in Amherst today is affordable housing. Because of university pressure on local housing, and because supply simply couldn't keep up with the expanding demand in the 1960's and 1970's, Amherst has had the lowest vacancy rates in the State for the past several years. The housing market is very tight, and large, single-family housing development pressures are increasing demands on municipal services and town character, without aiding at all in

alleviating any affordable housing problems.

4.5. HISTORICAL DEVELOPMENT OF PLANNING IN AMHERST:

In a State such as Massachusetts which has historically had such a reluctance to acknowledge the need for planning, the Town of Amherst has established a reputation for sound and aggressive planning. It was the first Town in the State to have a Town Manager (hired in 1952), and also the first town in the State to have a Planned Unit Development (PUD) in the 1960's. More recently, the Town has demonstrated its planning excellence through its affordable housing initiatives.

By the early 1970's, Amherst had hired a professional planning staff. The liberalizing influence of the university also helps to create an environment which is responsive to and supportive of planning. A more conservative or reactionary community wouldn't be so inclined to even hire a qualified staff. A quality staff would be quite limited if there is no receptivity to ideas and innovations.

Currently, the planning staff consists of a director and four assistant planners, each with a different speciality. The town had a two-year growth moratorium which expires in June 1988, and is now replaced by a fairly aggressive phased-growth by-law, which was acknowledged in the March issue of Planning magazine, the publication of the American Planning Association. The moratorium was instituted as a result of a four-fold planning crisis. 1200 housing units which were proposed to come on-line in one year prompted general

infrastructure concerns, as well as other specific concerns about the quality and capacity of the water supply, housing prices, and stock, and the loss of farmland and open space to subdivision development.

The present planning director brings expertise and initiative to his position in Amherst, as a result of his prior experience with planning in other states which are more advanced and aggressive in planning techniques. He is also a UMass alumnus, which gives him a special link with the University. He is supported by a very knowledgeable and experienced legal staff which is particularily concerned about zoning issues. The Town Counsel is very active throughout the region trying to understand the current land use and zoning issues, and also their legal consequences. Both the town counsel and the planning director are respected enough within the community and the town to shape discussions and initiatives.

The Planning Board in Amherst is also very active and involved. The nine members are appointed by the Town Manager, who selects the members based on merit, and also on an attempt to create a "balanced" board. In selecting members, the Town Manager tries to manage various balances, such as male/female, renter/owner, and long-time-resident/newcomer. Within the Planning Board, the politics are quite different from neighboring small towns which have powerful families or factions. Again, due to the university's influence, there is a sort of "social consciousness" or "gentility" to the politics in Amherst. There is much disagreement, but they argue, then vote, and then move on to the next item, unlike other towns where issues die hard, and

different parties hold grudges and engage in back-stabbing. According to the Chair of the Planning Board, the Board is well-informed and well-prepared on issues brought before Town Meeting. "We must do our work, because Town Meeting is a smart group of people as well."[1]

4.6. CURRENT DEVELOPMENT PRESSURES:

As indicated above, the most pressing issue is affordable housing. There are plenty of developers in line to build large, single-family homes in Amherst, which only exacerbates the affordable housing problem and creates other infrastructure concerns. The two-year moratorium was in response to a tremendous increase in the number of units proposed in one year, and the infrastructure capacity problems associated with those additional units.

4.7. NOLLAN AND PLANNING IN AMHERST:

During the moratorium, the Town was resolutely working on a phased-growth by-law to better control and manage the anticipated growth. As it was adopted to the zoning by-laws in November, 1987, the article begins, "The purpose of this Article is to ensure that growth occurs in an orderly and planned manner that allows the Town time for preparation to maintain high quality minincipal services for an expanded residential population while allowing a reasonable amount of additional residential growth during those preparations. The citizens of Amherst insist on, have pride in, and enjoy a reputation for such high quality and reliable municipal services, and several key municipal services, including water, human services and schools, are

[1]Telephone interview with Robert Rakoff, 4-25-88.

currently or may soon be under considerable strain. This Article will relate the timing of residential development to the Town's ability to provide services. In addition, this Article also proposes to encourage certain types of residential growth which reflects the values of the Town as previously expressed in both policies and appropriations."[2]

The by-law works under a point system, "the first in Massachusetts",[3] which rates new development according to its impacts on town services and also its relation to existing Town values and policies. The way the phased-growth program works, a growth rate limit is set at 250 dwelling units allowable per two-year period. The point system is intended to encourage certain types of development, such as affordable housing, open space, and aquifer protection.

The Town was considering this by-law addition when the Nollan case was announced. Being very responsible professionals, both the Town Planner and Town Counsel immediately began investigating the extent of the case, and the local vulnerability as a result of the holdings, or presumed holdings in Nollan. Each had collected all that was written about the cases in their search of an explanation. In fact, Robert Ritchie, the Town Counsel, was very active at various conferences state and nation-wide giving his expert opinion as to what the case actually means, and how municipalities can best guard against

[2]Article 14 to Zoning By-Law, Amherst, Massachusetts, amended through November, 1987, p. 74.

[3]Schwab, Jim, "Phasing Growth in Amherst", Planning, March, 1988, p. 34.

any challenges.

At the same time, in his Town, this aggressive phased-growth program was under consideration. Many experts were referring to this as a "lightening rod issue", one which is extremely vulnerable to potential legal and constitutional problems as put forth in Nollan. However, both the Planner and the Town Counsel, as well as most of the Town, felt quite strongly about the need for such an innovative and effective growth management system. As a result, they advised the Town to adopt the proposal.

The Town Planner says with confidence that this by-law is "Nollan-safe". He is more concerned with special permitting procedures, growth moratoriums, and various Boards in the Town which refuse any professional advice. Upon examination of the text, there are several obviously-intentional "loopholes". These allow for every land-owner in town to have one exception to the Planned Growth Rate and the Development Schedule: "For the purposes of this Article, any person who owned a parcel of land in Amherst prior to April 17, 1986, shall receive a one-time exemption (one building permit) from the Planned Growth Rate (Section 14.2) and the Development Schedule (Section 14.3) for the purpose of constructing a single-family dwelling unit on the parcel owned, provided that the single-family dwelling unit shall be owned and occupied by the owner of that parcel of land."[4]

[4]Article 14 to Zoning By-Law, p. 74.

One reason for these loopholes is to prevent a land-owner to immediately threaten that he or she has been denied all use of the land due to the limit on number of units as included in this by-law. With a loophole, every land-owner retains one chance to build as-of-right what was allowed before the new law took effect.

4.8. CONCLUDING REMARKS ON NOLLAN AND PLANNING IN AMHERST

One can be sure, that if any town will be ready for a challenge based on Nollan, it will be Amherst. The professional staff is keenly aware of the issues, and the development within the field of opinions with respect to the case. The elected officials have been educated as to the dangers, and the current disagreements even among the experts. However, this heightened awareness of the issues has not, in any way, paralyzed the staff or any planning activities in the Town. In fact, it has informed them, and helped to encourage even better-quality planning.

Through various interviews with some of the professionals and elected officials in the Town, and review of recent actions, I have noticed no evidence of a planning freeze in Amherst. Initially, there was some legitimate concern, but the quality staff educated itself as best as it could, and has continued to do its job and practice planning in the best interest of Amherst.

CHAPTER FIVE: N E W T O N, M A S S A C H U S E T T S

5.1. INTRODUCTION:

Newton, Massachusetts is a City of roughly 89,000 people, which shares its eastern border with Boston. Route 128 (I-95) and I-90 (the Massachusetts Turnpike) intersect in the western edge of the city, making it very accessible to the entire region. Although the City is just adjacent to the large city of Boston, the capital of Massachusetts, it is much more of its own city than merely a suburb or bedroom community of Boston. Newton is comprised of 14 different villages, each with its own distinct identity and character.

5.2. CURRENT CHARACTER:

Today, the population of Newton is very well educated and professional, with many university professors from the institutions around the Boston area choosing Newton as a place to live. It is a quiet and established suburban area, and very accessible to other urban centers. There is no real "town center" or downtown, but instead each of the fourteen villages essentially has its own center, character, and loyalty. There are also some very tightly-knit ethnic neighborhoods, such as the Italian area in Nonantum. The existing land use throughout Newton is mostly residential, with pockets of commercial and retail in these village centers.

5.3. POLITICAL STRUCTURE:

The City of Newton has a very strong mayor with a Board of twenty-four elected Aldermen who are very active in City issues. The Board selects its President, who then assigns the members to various subcommittees. Of these, the planning staff serves as advisor to the

Land Use subcommittee, which handles site-specific concerns; the Zoning and Planning subcommittee, which is concerned with text changes to the zoning ordinance; and the ReUse subcommittee, which handles all municipal buildings and proposals for re-use or changes in use, and the sale or lease of municipal land.

The City of Newton on the whole is very active politically. Each alderman participates in various committees and Boards, attending several issue-laden meetings each week. The population is also known to be extremely involved in local issues and politics. There is a tradition of strong neighborhood participation, such that citizens and elected officials both have come to assume this as the rule, rather than the exception.

5.4. PLANNING IN NEWTON:

Currently, the Planning and Development Department in Newton has four divisions: Planning, Economic Development, Housing, and Community Development. The total professional staff is fourteen, with four talented and aggressive planners in the planning division. The staff in the Planning Department is kept very busy, addressing the numerous and complex issues in the City, with a high degree of professionalism, and producing a tremendous amount of written support to each of the subcommittees and Boards. The Department is known to be quite careful and to thoroughly investigate issues before recommending action. As one staff-member explained, development pressures force the City to be current with the latest land-use techniques and Supreme Court cases. Also, the City has the personnel

and the skill level to be able to maintain such a high level of activity and ingenuity.

The planning staff is also supported by a legal department, said to be one of the finest in the State. The large legal staff is specialized, with specific attorneys assigned to the various committees and staffs within the city.

5.5. CURRENT ACTIVITIES:

As indicated in the introduction, Interstates 95 (Route 128) and 90 (the Massachusetts Turnpike) intersect in Newton, and each has several other exits in the City. As the Boston metropolitan region continues to grow and prosper, each of these exit areas becomes more and more desirable for development. In August, 1987, the City ended a one-and-a-half year moratorium on commercial development, which had been in effect until new zoning by-laws could be designed and adopted. During that time of no commercial development, however, the City saw a tremendous increase in residential development. Most of this development is luxury housing, and most of it is high-priced.

The new Planning Director, in an interview when he first assumed his position in December, 1987, recognized this pattern in housing development, and indicated that affordable housing would be a primary concern of that Department. Although Newton residents tend to be well-educated, professional, and also wealthy, many residents could not afford to buy the home they now own. The economic prosperity of the region and the desirability of Newton as an established

residential area have driven housing prices sky-high.

The Newton Board of Aldermen is not wary of the concept of "affordable housing". There is an acknowledgement that many of those who choose to work in Newton and provide services to Newton are not able to live there. Therefore, the City government has been active in implementing affordable housing initiatives.

5.6. AFFORDABLE HOUSING AND THE "10% ORDINANCE":

Recognizing the need for affordable housing in Newton, the Newton Zoning Ordinance contained a provision, known as the "10% Housing Ordinance". In the fall of 1986, there was a petition to revise and improve upon this ordinance. In an analysis of the petition, the Director of Planning and Development described its elements: "The petition seeks to expand and clarify current provisions of the zoning ordinance found in Section 30-29b(1) and (2). This section, known as the 10% Housing Ordinance, requires developers of new housing who obtain permission from the Board of Aldermen to construct more units than would normally be allowed to provide 10 percent of those units for low and moderate income tenants." In his conclusion, he stated that "the proposed ammendments would broaden and clarify the City's 10% policy. They also successfully address a variety of issues which have arisen during the past 10 - 15 years. It is therefore recommended that the petition be approved."

The 10% Housing Ordinance applies to all multi-family housing development in Newton. If a developer comes before the Board of

Aldermen seeking a special permit for a density bonus, and if the Board finds that granting such a bonus will not compromise the public welfare, it may grant the permit, but under the condition that 10% of the total number of units, including the bonus, would be made affordable. The ordinance goes on to define "affordable", and various stipulations and exceptions according to project type, size, and cost.

As the hearings went on through 1987, the stage was set for action on this petition by October. However, the Supreme Court ruled on First English and Nollan that summer of 1987, and Newton definitely took note. The land use attorney in the legal department, in cooperation with the entire staff, analyzed the two cases, and in particular Nollan, to determine the state of Newton city planning relative to the holding in Nollan. This is but one example of the competence of the Newton staff in anticipating issues, instead of just waiting for a controversy to occur, and then react to it. The issue received a lot of attention within City Hall, and many memos and briefs were circulated to keep the various individuals updated.

5.7. NOLLAN AND PLANNING IN NEWTON:

The law department released a five-page inter-office memo on October 30, 1987 entitled, "Recent United States Supreme Court Decisions Regarding Regulatory Takings/Impact on 10% Ordinance". The memo began with a summary of land use cases over time from the Supreme Court, and then gave more specific explanation of the holdings of the two recent cases. Finally, the memo concluded with a statement of the "Impact vis a vis 10% Ordinance".

The memo, addressed to the Board of Aldermen, begins, "Many of you may be aware of a recent series of cases decided this year by the United States Supreme Court, which have further defined the law regarding eminent domain and more specifically the concept of regulatory takings. These cases, and especially the Nollan case may well have an impact upon certain aspects of the 10% ordinance, now presently under review by the Land Use Committee."

The legal department memo focuses on the nexus requirement of the Nollan holding. It doesn't address (nor is it necessary for the scope of the analysis) the possibility of the "stricter standard" as some commentaries on the case have been suggesting.

The analysis thoroughly describes the current case law, and also the concensus of most commentaries with respect to the Nollan case. It also carefully demonstrates how the petition currently under review is affected by Nollan. "When placed in the context of the Nollan decision, our 10% ordinance raises significant concerns. It is now more than ever clear that for an ordinance such as this to survive a constitutional challenge, it must have a clear and direct nexus to the governmental interest sought to be advanced."

The memo gave the following analysis of the impact of Nollan on the 10% ordinance: "a property owner seeks a special permit to develop housing (leave aside the issue of housing type and assume the developer seeks a density bonus); the Board of Aldermen has the power

to grant or deny the permit; since the permit could be denied for valid land use reasons if it does not satisfy public convenience and welfare it may be granted upon condition; however any conditions placed upon the grant must directly relate to the impact that the project has on the governmental interest. As our zoning ordinance recites that it is in part designed to encourage housing for persons of all income levels, clearly a 10% requirement relates to that purpose. However, for the 10% requirement to be applied to a particular housing development, it must offset some negative impact of that development on that particular governmental interest (emphasis added)."

The memo continues with a summary of studies of exactions and linkage programs, and how these programs have been proven to have a clear nexus. For instance, a commercial development will require personnel to fill the created jobs. There is a ratio for each community of the number of commuters to number of resident workers. Using this ratio, one can calculate just how many of the created jobs will be held by residents, who are new to the community. This number is the impact on local housing. Some percentage of these workers will not be able to afford housing in the community, and thus it can be required that the developer provide some affordable housing to offset the burden created by the development.

Studies have also been done supporting exactions for adverse impacts on other areas of a community. Large developments can have measured impacts on traffic, or community-provided services, such as

schools, fire districts, or water supply. These impacts can be calculated, and the developer required to compensate or mitigate the negative impacts caused by the specific development.

The "nexus" between luxury housing developments and affordable housing is not so clear. The Newton report explains, "However, it is not so clear that a luxury housing project specifically results in a need for low income housing which the 10% provision addresses. I am aware of no studies that have been done in Newton to specifically deal with this concern .... since all housing may create some demand of low-income housing, there must be a rationale to focus on multi-family developers for application of the 10% ordinance."

5.8. THE "REVISED" 10% HOUSING ORDINANCE:

Finally, by December 7, 1987 a final draft had been submitted to the Board of Aldermen for approval. The October 1987 memo concluded: "...our 10% requirement must be voluntary--the developer must get something 'extra' to avoid a taking challenge. Nollan reinforces this, as now it is clear that additionally the 10% condition in a special permit must directly relate the actual impact of development and our governmental interest in regulating that development."

Under the new ordinance, any housing development requesting a density bonus can be subject to a condition from the Board of Aldermen, which issues the special permit. If the permit is granted, it is under the condition that 25% of the additional, bonus units be

affordable, not 10% of the total units in the development. In the actual ordinance: "There shall be provided, on site and within the development, low income dwelling units equal to 25% of the number of units granted which exceed the number of units allowed as of right. However, notwithstanding the above, the number of low income dwelling units to be provided shall not exceed twenty (20) percent of the total number of units in the development."

5.9. CONCLUDING REMARKS ON NOLLAN AND PLANNING IN NEWTON:

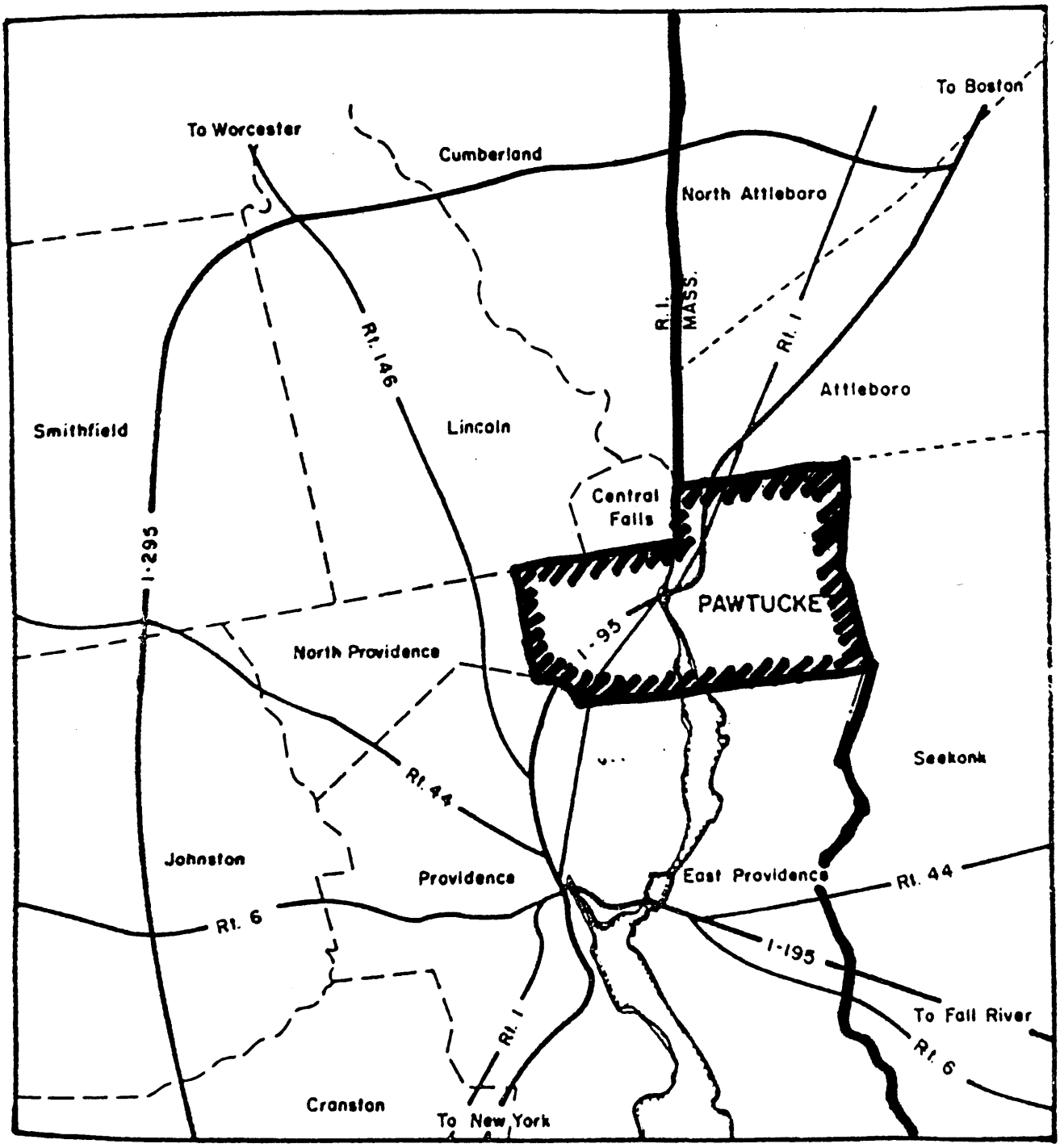
Planning in Newton has been an obvious answer of a direct impact of the Nollan ruling. In this case, the planning activities were proceeding as usual, when the department became alerted to the Nollan controversy. They were currently in the process of strengthening an ordinance, and had to rethink the entire logic and basis. As a result, the text was significantly altered, to what seems like a much less-aggressive outcome. However, according to one staff member in the planning department, the new ordinance actually produces more affordable units for the town than the old.

For example, consider the case of a developer who can build ten units as-of-right, and requests a density bonus of ten more units. Under the old ordinance, the town would achieve two affordable units (10% of twenty) whereas the revised ordinance would require that two and a half units be affordable (25% of ten). When the total number of units is low, and the density bonus is high, relative to the number allowed by-right, the numbers work in the favor of the City under the new, revised ordinance.

If the developments were much larger, for example, one hundred units as-of-right with a density bonus of fifty units, the numbers are more favorable under the old ordinance. Under the old ordinance, the City would achieve fifteen affordable units, while the new ordinance would afford only twelve and one half. Or, if a density bonus is only a small percentage of the number of units as of right, the advantage to the City changes. For example, a developer has control of a parcel on which he or she is allowed by-right to build twenty units. If the request is for five additional units, the old ordinance produces two and one half affordable units, while the new ordinance requires less half that amount.

Considering the average magnitude of development in Newton, which is quite small, and the average density bonus which is large, it would appear that the revised ordinance is a step forward, towards more aggressive planning. My conclusion is that Newton originally had an aggressive, but not well tested affordable housing initiative, which was one of the few existing at all in the State. When confronted with the Nollan decision, the City reviewed the ordinance, and actually came up with an even better, more aggressive, and tighter ordinance. The new ordinance achieves more affordable units for the City, and is more legitimate legally, especially in the context of the law as spelled out in Nollan.

CHAPTER SIX: P A W T U C K E T, R H O D E I S L A N D



6.1. INTRODUCTION:

"Pawtucket also retains enough evidence of its unique history, its streets, mills, trees, and much of its architecture, still standing although often underappreciated, to prove not only that its been around for some time, but to suggest by example that it might very well be around for a while longer."

Today, Pawtucket is a blue-collar community in the northeast corner of Rhode Island, known as the Blackstone Valley. It is bisected by both the Blackstone River flowing south from Massachusetts to the Naragansett Bay, and Interstate-95 which runs north-south along the east coast from Maine to Florida. It grew up around the Blackstone River, using its power to run cotton and textile mills. The city peaked economically around the early twentieth century, and its population has been slowly declining since its height in 1950, to its current number of around 73,000. The major activities in the city today are light manufacturing, some commercial, and retail, medical, and education services.

6.2. HISTORICAL DEVELOPMENT:

Pawtucket is an older, urban community, which was first settled in the late seventeenth century, with a forge near the falls on the Blackstone River. Samuel Slater, adapting the English technology, opened the first cotton mill in the United States on the Blackstone River in Pawtucket in 1790. Taking advantage of the power provided by the river, the Pawtucket area developed industrially with textile and manufacturing mills. The city grew up in the classic mill-town

formula: factories in the downtown along the river, surrounded by triple-deckers providing cheap housing for the factory employees. Finally, on the edges of the city are larger, single-family homes for the factory owners and the upper class.

The City's prime location on two major rail lines linking Boston and Providence helped the manufacturing industry to flourish in its early years. However, by the 1930's, the textile industries were leaving all of New England for cheaper wages, among other things, in the South. As these industries left Pawtucket, the mill buildings were gradually occupied by other manufacturing businesses or remained vacant. Even so, the City continued to attract single-family residential development in the urban fringe.

By the 1950's, a major reform movement was begun to rid the City of corrupt politics. Before that time, the city was run by machine politics, being first dominated by the Republican Party, and more recently the Democrats. As a result of this reform movement, a new City Charter was drafted including a home-rule concept, giving the City expanded administrative powers, and allowing the City to by-pass the cumbersome State legislature.

The new charter also introduced a strong mayor/weak Council form of government with a mayor and a unicameral council of nine members. Previously, the power was in a bicameral form of council, with five aldermen and fifteen common council members. The new charter also afforded to Pawtucket a full-time city departmental

structure. Under this system, all department heads are appointed by the mayor, and could therefore conceivably change every two years with every new administration.

6.3. PLANNING INFRASTRUCTURE:

The historical development of planning in Pawtucket is very much intertwined with the politics. A Planning Department was established in 1952 in the new city charter. Since then, the Department has undergone various restructurings, the most drastic of which occurred in the late 1970's when the Department moved out of City Hall into a separate building. This move was intended to disassociate the Planning Department from the "City Hall syndrome" and the reputation of "sitting back and doing nothing," and corrupt city politics. However, because the director is politically-appointed, the Planning Department is still intricately connected to the mayor and his or her adgendas.

The first zoning ordinance of Pawtucket was established in 1928 reinforcing the patterns of two centuries of land use in the area. In addition to creating the Planning Department, the new city charter in 1952 also established a City Planning Commission. This commission, consisting of five members who are appointed by the Mayor (subject to approval by the Council), reviews referrals such as zoning changes, as passed on by the City Council. Today, this Commission is comprised of "five regular citizens, no movers and shakers".[1] The

[1]Interview with Paul Mowrey, Principal Planner, Pawtucket Department of Planning and Development, 3-24-88.

Chairperson admits that the Commission is not very active, because "things are rather slow ... there is not much building at all to be concerned about."[2] The Commission meets monthly, as required by city charter. These meetings are rarely attended by citizens, and more rarely covered by the press, unless it is a very hot political issue.

None of these members is particularily active in planning issues, although the planning department attempts to educate and advise the Commission where necessary. Most are involved either because of political adgendas, or simply for the prestige of being appointed to a City Commission. The Commission is volunteer, but has a small, operating budget to cover various costs. In fact, Pawtucket is one of the few cities which includes in this budget a provision for Planning Commissioners to attend planning conferences, to educate themselves on issues in the planning field. However, none on the present Commission have ever taken advantage of this, or other resources for training to be an educated Planning Commissioner.

The story of activities within the City's Planning Department follows the pattern of various federal and state requirements or funding programs. In the 1950's, Interstate-95 was being planned along the East Coast, and tentatively sketched to pass through Pawtucket. Finally, the Rhode Island Department of Public Works decided on a location for a highway bridge over the Blackstone River, and left it to the City to design the path of the highway through the

[2]Telephone interview with A. Denis Markley, Chairperson, Pawtucket City Planning Commission, 4-21-88.

rest of the City. As the City planned for the route of the four-lane Interstate highway through the heart of the downtown, some interest in preservation and restoration of the historic area around the Slater Mill Historic Site in the downtown occurred.

Under the Urban Renewal Program, the federal government required a city to have a master plan in order to be eligible for and receive Urban Renewal funds. The Redevelopment Agency and the Planning Department, in an effort to take advantage of these funds to revitalize the downtown, created the first Master Plan in 1961. The Slater Urban Renewal project began in 1965 under this plan. The last master plan was created in 1965 as a part of the Slater Urban Renewal project. It has since been updated, but only through ammendments.

By 1968, the federal government had changed its priorities to neighborhood development, and therefore, so did Pawtucket's Planning Department. Pawtucket was designated one of the first Model Cities, and received federal monies under that program. In the mid-1970's, the federal government once again re-oriented its urban assistance program, this time in the form of Community Development Block Grants (CDBG), under which the Mayor is a chief party in developing a program. In 1978, Pawtucket received Urban Development Action Grant (UDAG) funds for the redevelopment of a vacant horse track into a mixed-use project. Since then and until recently, CDBG funding has been the main source of funding for Pawtucket. As the federal emphasis moves towards economic development, so, too, do the development objectives of Pawtucket.

6.4. CURRENT ACTIVITIES:

As evidenced in recent publications, the current activities of the Planning Department have shifted away from redevelopment towards economic development. A 1987 Department of Planning and Development publication, "1987....A Look Back, A Look Forward...." states that, "emphasis on renewal activities have decreased, while economic development initiatives have increased." The Department is now looking to the State for funding, as well as the private sector. This is a new era for the Department to be innovative and creative in its programming, planning, and development.

The Department of Planning and Development, which now encompasses redevelopment, housing, and fiscal divisions, as well as planning, currently has a staff of twenty-seven. The Planning Division has a two Principal Planners, and two relatively-inexperienced, staff planners. There are various projects and activities by which the staff is kept occupied. An updated land use map is kept in the conference room for reference at meetings and conferences. There is also an updated open-space plan, as required by Rhode Island State law. The Rhode Island legislative is currently considering a bill which would require all Rhode Island communities to have a comprehensive plan, in which case, Pawtucket would design a new mster plan. Pawtucket recently celebrated its Centennial as a city, and the Planning Department was very active in providing staff support to the organizers.

The Department is restricted in many ways in its initiative and professional ability. As indicated before, and according to one Principal Planner, "the Mayor really sets the tone for what goes on, planning-wise". The current Mayor is very conservative, and the Department anticipates definite changes in policy-orientation. Secondly, the Planning Department is restricted somewhat by the conservative nature of the community. For the most part, the people are blue-collar, middle class, don't like change, and are very reluctant to spending City money. "The City sort of has a 'show-me-why' attitude with respect to capital expenditures, and feels that the needed improvements to the City are too expensive."[3]

The Planning Department attempted one recent initiative by creating a pedestrian mall in the downtown shopping district. The merchant community was indignant, and called it "isolated" and "abandoned". There was tremendous outrage at such extravagant and unecessary spending when the previous conditions were quite satisfactory. Today, to make the shoppers "more comfortable", automobiles drive through this area which was designed and constructed for pedestrian access.

Many of the activities which do take place in the planning department occur in the absense of any coordination with neighboring communities. There is no regional planning agency in the State of Rhode Island, to facilitate such collaboration. However, when faced with a specific issue which crosses community boundaries, Pawtucket

[3]Paul Mowrey, 3-24-88.

does concede to interact with its neighbors. Otherwise, the staff presumes that there is not much necessity for communication with the neighbors on planning activities.

Finally, the City planning department assumes that it is limited in its planning initiative because it is 93% developed, and there is not an abundance of vacant land to be planned, preserved, or targeted for development. Most of its activities are reactive: reactive to funding requirements, state law, the current trends in planning, or the Mayor's adgenda. It doesn't receive much support from the conservative community, nor the city politics. Neither of the two of the powerful forces in the City, the Chamber of Commerce and the local newspaper, seems to be interested in local planning issues, which the Planning Department sees as a disadvantage to planning. Each of these is attempting to reorient itself to the entire regional community. For example, the newspaper was recently renamed from the Pawtucket Times to the Evening Times, reflecting its commitment to issues beyond city boundaries, sometimes at the expense of local issues.

6.5. NOLLAN AND PLANNING IN PAWTUCKET:

The professional planning staff in Pawtucket is aware of both of the recent Supreme Court decisions. Through various news publications and professional journals, the planning staff has become acquainted with these two cases, but has not taken any interest in

pursuing the development in the literature. "This being a pragmatic place, there was seen to be no problem ... We've never had a complaint about the regulatory practices of the city, so there is no reason to be concerned [with Nollan]."[4] The legal staff also has never expressed much interest in zoning or land use issues, and can see no reason to review these cases. In addition, the principal planner pointed out that Rhode Island land use court cases have historically been slanted towards developers, and will not be in jeapordy as a result of these decisions. In concluding, the planner admitted having "no reaction" to the case, and believed that because there is not much activity in Pawtucket, anyway, it would not infringe upon them at all.

Based on my observation of the City, its history and politics, the various individuals, professional, elected, and appointed individuals, I do not believe that Nollan has had or will have any impact in Pawtucket. Because the City does not seem to be doing much planning, it is correct in assuming that Nollan will not restrict its activities. When the only activity is collecting and publishing data, or updating colorful land use maps, a Supreme Court case about a necessary nexus between a condition and the original permit will not be terribly significant, or meaningful.

However, there is the possibility that the planning in the past has been so uninformed as to have unknowingly (and unintentionally) infringed on some sort of constitutional right. I cannot be certain, but I have reviewed zoning by-laws for certain "lightning-rod issues"

[4]Paul Mowrey, 3-24-88

with respect to Nollan: growth rate controls, conditional uses, special permits, and others. I have also contacted members of the Planning Commission, the Building Inspector, and the City Solicitor for their perspective on this case. I have overwhelmingly found tremendous lack of concern for any rational or reasonable basis, but merely extremes of politics and misunderstanding. Most of the individuals are uneducated with respect to issues, and prefer to remain that way.

I cannot be certain that Pawtucket is not vulnerable to a challenge based on Nollan. Further research and investigation could possibly uncover either a confirmation or a contradiction of my conclusion, that Pawtucket is going along, "business as usual", in which case there is not much likelihood of any breaching of the Nollan case, or any future cases.

CHAPTER SEVEN: P L A I N V I L L E, M A S S A C H U S E T T S

7.1. INTRODUCTION:

Plainville, Massachusetts is a rural town in southeastern Massachusetts, about fifty miles southwest of Boston, and bordering Cumberland, Rhode Island with its western town boundary. Plainville is also located ten miles North of Providence, Rhode Island, in the original highway corridor on the East Coast, Routes 1 and 1A. The town center grew up around the intersection of Route 1A and 106, in the Southwest corner of the town. More recently, Interstate 495 was built in the 1960's as a ring-road to Boston and passes through the northeast corner of town, with an exit in Plainville at its intersection with Route 1.

7.2. HISTORICAL DEVELOPMENT:

The town is located on the original rail and highway corridor between Boston and Providence, and the rest of the East Coast. The Town originally began developing with manufacturing industries, because of the easy truck and rail access, and blue collar workers, because of proximity to factory jobs. Until 1905, when it was formed into its own town, Plainville was called the Village of South Wrentham, and associated with the Wrentham area to the northwest. This area has rolling hills, with large, single-family Victorian homes. The Plainville area was the "poor section of town, with the 'peasants', blue-collar workers, and factories."[1] The Town has not changed much since. Most of the population is lower or middle class, and the homes are small, of fair quality.

[1]Telephone interview with Andrea Soucy, Chair of Plainville Planning Board, 4-27-88.

The boundary of the town is shaped almost like a parallelagram. The topography reflects early north south glacial scouring. The two sides particularly the western edge, are hilly and more rural, separated by a flat valley through the middle of town. In this valley are some waterways: the Ten Mile River, Mill Brook, and Turnpike Lake; and also wetlands, particulary in the eastern end of town. This low, flat and open valley was an ideal path for a railroad corridor connecting Boston and Providence, and paralleling Route 1A. Because of the transportation link, gravel and concrete operations have historically located around this now-abandoned rail bed. Due to the poor soil conditions, most of the historic land use has been small family farms, horse farms, or forrestry. There has been some industrial useage in gravel operations, taking advantage of the rocky soil.

Economic growth spread to Plainville during the early nineteenth century with local craft industries. The jewelry manufacturing of Pawtucket, Providence, and Attleboro spread into Plainvile along Route 1A. Evidence of twentieth century development of the highway corridor is along Route 1, commercially strip-zoned, and dotted with gas stations, truck stops, and convenience stores. Abandoned and recently active gravel operations have located near the railroad bed in the valley area.

The population of Plainville, today numbers over 6,000. The majority of these residents are blue collar and work in the town in

the local jewelry manufacturing industry. The town center contains several abandoned and some active jewelry factories and metal manufacturers. To support these blue-collar workers, the south and central parts of the town, near the factories are mainly undistinguished two and multi-family housing, or single family homes on small lots. The larger and older Victorian farm houses are located on the fringes of the town, on larger tracts of land.

7.3. CURRENT ACTIVITIES:

Because of its location on a rail and highway corridor, there are many industrially zoned areas in Plainville. These activies include gravel operations, some concrete manufacturing, and metals manufacturing for the jewelry industry. Commercial development has been sparse, with just a few restaurants or liquor stores in the town center. A small, local shopping plaza with some shops and fast-food restauraunts is just growing in the Southeast corner of town, at Wilkins Four corner, at the interection of Routes 152 and 106.

Plainville in the near future is likely to remain untouched by regional commercial or industrial development pressures. Ten minutes south of Plainville in North Attleboro is a large, regional shopping mall, with another planned for Norton to the northwest. The surrounding towns of Franklin, Mansfield, and Attleboro each has major commuter-rail and railroad connections. Because the Town of Plainville can access these regional services located almost adjacent to it, it is unlikely that Plainville will be targeted for any such regional developments, at least in the next ten or fifteen years.

However, in the area of housing, Plainville has definitely been impacted by regional development activities and pressures. From 1970-1985, while Plainville's population grew more that 21%, the number of housing units grew by 64%. Between 1985 and 1987 alone, there were thirty subdivision proposals submitted to the Planning Board. Today, Plainville has eighteen active subdivisions, and a total of nearly four-hundred house lots. The long-time residents of the town are petrified and threatened by any of this new type of residential development in their town.

The tremendous growth in the number of housing units has raised concerns about the changing character of the town. Most of these new homes being built on previously wooded tracts, are well out of the price-range of local residents, starting at over $200,000. Those interested in these new subdivisions are childless, professional couples, who are attracted to the rural character, relatively-low housing prices, and also recent job-growth along Route 495.

7.4. PLANNING INFRASTRUCTURE IN PLAINVILLE:

There has never been professional planning staff in the Town of Plainville. The Town has an elected Board of Selectmen, which appoints the Board of Appeals. The Planning Board, made up of five lay people, is responsible for reviewing development proposals. There is a traditional town meeting form of government through which any changes to the zoning ordinance must be passed by a two-thirds majority vote, which is often particularily difficult to achieve. As

a result, the only types of changes which are easily passed are restrictive zoning initiatives.

Although the Town has no professional staff, it has from time to time contracted with planning consultants for specific projects. In 1964, the town hired a Boston consultant, the Economic Development Associates, to prepare a comprehensive plan and incorporate zoning by-laws. The plan basically reflected existing land use patterns and the community preference for the locations of residential, commercial, and industrial development. Since then, there have only been several revisions, with one re-write in 1983.

Today, the Town of Plainville relies heavily on the Southeast Regional Planning and Economic Development District (SRPEDD) for planning and professional advice. SRPEDD is the designated regional planning agency for the southeastern Massachusetts area. The Senior Comprehensive Planner at SRPEDD effectively serves as a town planner to Plainville, providing advise and assistance to the various boards, and participating actively in local activities. However, SRPEDD has no specific authority over the town to implement any programs.

The planning activities today are focused around controlling residential development, preserving rural character, and restructuring the zoning districts to be more sensitive to water supply issues. A buildout analysis was produced in December 1987 by SRPEDD for Plainville, to help the community visualize the long term consequences of their zoning by-laws and their maximum capacity. Under current

zoning, the major industrial parcels in Plainville are located either in watershed areas, or directly above aquifers or wells which are critical water supplies, not only for Plainville, but for the entire Attleboro and even Massachusetts area. The rocky, sandy soil is far from ideal for agriculture, but it is excellent for providing wells and aquifers. Even though it is a valid objective to protect these areas, it is not a major concern or priority for the town citizens. The majority of the town meeting is concerned simply with preserving their interest in the rural character of the town.

7.5. TOWN POLITICS

The political structure in Plainville is critical to understanding the current activities. As was said previously, the town is governed by Town Meeting, and has several Boards, elected or appointed. These Boards have recently become quite polarized on growth issues.

For example, most recently, the Board of Selectmen and the Board of Appeals have adopted a pro-growth stance and been relatively loose in their reviews. The Board of Health, the Conservation Commission, and the Planning Board have opposed the other two Boards with an anti-growth stance and also being much more strict. More recently, the Board of Selectmen and the Planning Board have been approaching each other in terms of a more moderate growth stance. According to the Chair of the Planning Board, "I'm not against building; my father was a contractor. What I am against is careless or no planning."[2] This woman, a school teacher in Attleboro, is quite

aware of the problems when an area allows uncontrolled growth, and makes no efforts to expand its municpal services such as infrastructure and schools.

On the other extreme, the Board of Health, which is the most powerful of all Boards as designed by state law, has recently become extremely anti-growth. The current Chair is quite aware of the strength of this Board, and uses this inherent power within the political structure to the advantage of the Board's anti-growth position. There has been some tension between the boards because of these disparities with respect to growth issues and also relative strictness.

In the opinion of the Senior Comprehensive Planner for SRPEDD, the planning board members have a fair understanding of zoning issues, especially for being all lay people. After several interviews, I have been impressed with the level of understanding and interest among several members of the different Boards. They all admit to having no training at all in planning or engineering issues, but have paid close attention to consultants, and made substantial efforts to educate themselves as best they can.

7.6. DEVELOPMENT ACTIVITIES:

Historically there has not been much interest in development in Plainville. In the last ten years, housing development has sky-

[2]Andrea Soucy, 4-27-88.

rocketed in Plainville. It is an attractive, rural area, and also very accessible to Route 495. It has been relatively easy to subdivide and build, because local design controls didn't exist, and local opposition and concern was slow in developing. Most of the developers of these subdivisions are local, and have used standard, "formula" floor plans, facade design, and site plans, merely superimposed upon the land, with no consideration for any local soil, topographic, or character conditions.

7.7. NOLLAN AND PLANNING IN PLAINVILLE:

The regional planning agency, SRPEDD, is very active in following the literature regarding the impacts of Nollan. They have an attorney on staff who closely reviews all endeavors of the office. The senior comprehensive planner had made the Planning Board members aware of the case, and the current state of thinking among the experts as to what the case means. The Chair of the Board of Health read about the case in the newspaper, and "immediately phoned the legal advisor [Gregory McGregor, of McGregor, Shea, and Doliner in Boston] to find out what this meant."[3]

Through my interviews and observations, I have noticed that the professionals and elected officials in Plainville are aware of the confusion and potential limitations as a result of Nollan. They seem to have a fair understanding of the situation, enough to disarm any

[3]Telephone conversation with Marcia Benes, Chair of Plainville Board of Health, 4-24-88.

ill-informed developer who threatens to sue because the zoning on a parcel of land forbids him or her from building just what he would like. There is planning activity going on in the town, but I feel that the SRPEDD staff has enough experience and skill to flag any potential problems the Town might be encountering.

As with Pawtucket, I cannot immediately presume that Plainville is well-protected against a Nollan challenge. I have reviewed the zoning by-laws, looking for such "lightning rod issues" which are particularily vulnerable to a challenge based on Nollan. I have not noticed any such issues, or any change in the approach to planning as a result of Nollan. I do think that the planner in particular is subtly aware of the need to do better-quality planning.

There are currently two major planning activities in the Town. One, many residents are advocating up-zoning most of the Town to two-acre, single-family zoning, to preserve the existing open, rural character. I think that the Planning Board, the SRPEDD staff, and some of the town residents are aware of the lack of rational justification for this move, and at least to this point, have successfully deferred the movement. The second planning activity in Plainville is ground water protection. As indicated in the beginning of this chapter, the industrial uses in Town have historically located on top of valuable aquifers and water supplies. Currently, under the initiative of SRPEDD, Plainville is attemting to plan for future growth, targetting certain areas and protecting others, particularily those above valuable water resources. Most experts indicate that

planning initiatives based on ground water protection goals are "Nollan-safe".

7.8. CONCLUDING REMARKS:

I think that the Town of Plainville, aware of its financial constraints and lack of education, is making commendable efforts to anticpate its needs and future expansion. It lacks any tremendously innovative professional staff, but at the same time, is not completely blinded to current regional and planning actities.

CHAPTER EIGHT: CONCLUDING REMARKS ON COMMUNITIES COPING WITH THE NOLLAN SUPREME COURT RULING

8.1. INTRODUCTION

This thesis originated with an interest in planning and how it is shaped by the law. I was initially intrigued with the controversy in the literature over the Nollan case, and how differently it could be interpreted. Since most commentaries were speculative and reflective rather than founded in any sort of data or observations, it seemed a valid objective to actually collect some data, and make some observations of various planning activities.

After tracing land use law up to the present time in Chapter Two, I briefly presented the Nollan case in Chapter Three, and the controversies surrounding the decision. With this introduction, I set out to observe and investigate the current state of planning in four select examples in the Massachusetts area. The four communitites, which were chosen with expert advice, have provided a very rich array of contrasts and a variety of patterns and reactions to the case.

8.2. SUMMARY OF CONCLUSIONS IN CASE STUDIES:

8.2.1. The Town of Amherst, Massachusetts

In the small town of Amherst, I noticed no reversal in planning patterns as a result of the Nollan decision. Previously, the staff in this small, liberal university town in western Massachusetts was known for its innovative planning. Following Nollan, the staff made an educated decision to continue with its adventurous planning,

confident of its integrity and grounding in sound planning objectives.

8.2.2. The City of Newton, Massachusetts

In Newton, a large, suburban city, I have observed an already aggressive inclusionary zoning ordinance which has become an even more aggressive and tighter affordable housing initiative, as a result of Nollan. It achieves more affordable units for the City, and also is a better ordinance in terms of conforming to the law as put forth in Nollan. It is obvious that further ordinances in Newton will be analyzed thoroughly in the context of the Nollan decision, and also become better. When confronted with the law, this staff has risen to the challenge and improved the quality of its output, not compromised its pursuit of the public interest.

8.2.3. The City of Pawtucket, Rhode Island

Although I have not observed any concern among the professional staff or the elected and appointed officials in the blue-collar, conservative city of Pawtucket, this is not a conclusive result. One can be certain, however, that Pawtucket would be ill-prepared for any skillful attorney who wanted to bring a challenge based on Nollan. The staff is not interested in anticipating future breachings of the Nollan holding, or any future holdings based on Nollan.

8.2.4. The Town of Plainville, Massachusetts

There seems to be a fair amount of planning activity occurring in the small, conservative town of Plainville. These activities are guided by a competent planning, legal, and engineering staff at

SRPEDD, are mostly related to ground water protection issues, and are therefore relatively safe from any challenges based on Nollan.

8.3. COMPARISONS ON VARIOUS DIMENSIONS:

Each of the four communities is a different example of planning and responses to the Nollan decision. Some, when juxtaposed with others, provide interesting comparisons of reactions. For instance, Newton and Amherst, although one is a City and the other a Town, each of very different size, are both rather educated communities, faced with affordable housing issues and a tight housing market. They each have very capable planning staffs, and their reactions to Nollan are both quite bold.

Second, Newton and Pawtucket, the two cities in this study, each of similar size and each located adjacent to a major metropolitan city, are very different in their politics and the characteristics of their populations. They also each have quite opposite planning perspectives and reactions to the Nollan case.

Third, Amherst and Plainville are the two towns in this study. Amherst is much larger than Plainville, but there are some similarities in terms of town politics. However, the charactistics of the town populations are quite different, as well as the reactions to Nollan.

8.3.1. Newton and Amherst

Newton and Amherst are the two communities in this study with

aggressive planning and skilled legal advice. Newton is a City, with a population almost three times greater than Amherst, and its planning and legal staff are both equally larger. At the time of Nollan, each community was considering an aggressive move, in terms of either tightening up an existing ordinance (in the case of Newton) or replacing a moratorium with more long-term actions (in Amherst). Each of these communities has competent planners who heard about the Nollan case, sought legal counsel, and then made a decision as to how to proceed.

When the fury over Nollan reached Newton, consideration of the 10% ordinance was suspended until the case could be thoroughly analyzed. Finally, the original wording was replaced with more-aggressive wording which achieves more affordable units for the City, and is a tighter regulation under Nollan. The new regulation has a closer nexus between the condition and the special permit, than did the original one. Nollan provided the impetus for the staff to review an ordinance, and propose its replacement with a better one.

The deliberation process in Amherst had a similar result As both the Town Planner and Town Counsel were travelling around lecturing about the general impacts of Nollan during the summer of 1987, both were at the same time trying to understand the specific impacts of Nollan on the innovative growth rate control program which was then under consideration. Finally, after several months of calculated consideration, research, and advise, it was recommended that the Town proceed with the new program. This was an educated

decision, based on thorough research, and a belief in competent, qualified planning for the good of the community.

8.3.2. Newton and Pawtucket

These cities present a study in opposites. They are both large cities, located next to an even larger, major city. Both cities are of comparable size, but this is where the similarities end. Newton residents are more wealthy and educated. Known as the Garden City, Newton consists of mostly large, single family homes, on half-acre or larger lots. In contrast, the population in Pawtucket is mostly blue-collar and middle income, and much less educated than the Newton population. The City of Pawtucket is densely developed, with some industry in the downtown, mostly triple-decker housing, and some single family houses on the fringes.

Both cities have large planning staffs, which produce a significant amount of written reports. However, the development activities in Pawtucket are much less volatile and intense than in Newton. Both the planning and legal staffs in Newton are concerned and educated with land use issues, while in Pawtucket, there is much more concern recently with economic development. Because of the skill level in Newton and also the development activity, the staff is able to keep current on developments in the law about land use regulation. On the other hand, Pawtucket's staff is not extremely interested in innovative planning, and is under the impression that it need not be concerned about Nollan.

As stated above, Nollan pushed Newton to further scrutinize its 10% ordinance, and come up with a better regulation. It exchanged a pioneering but not well tested or proven ordinance, for a more adventurous and tighter one, which was thoroughly analyzed from the standpoint of affordable housing and also the law. Pawtucket, in contrast, seems to be happily unaware of a need for caution or concern in the wake of Nollan.

8.3.3. Amherst and Plainville:

These two towns provide yet a third dimension for comparison. Both are small, rural towns, located in scenic, relatively untouched regions of Massachusetts. The main activities in Amherst have been agriculture and education, while Plainville is associated more with jewelry manufacturing industries. Because of the colleges in Amherst, the population is more educated, while Plainville residents are more conservative and blue-collar.

Amherst seems to have progressed out of "small town politics" to a more educated, gentile approach to politics and planning. The Town proceeded with its phased growth program, even after the uncertainties surrounding Nollan. In Plainville, there are some very active and eager individuals who participate in politics. However, the Town is still struggling with major development pressures and decisions in the context of voluntary municipal officials.

8.4. VARIED TYPES OF REACTIONS TO NOLLAN:

Based on my study of four communities as well as interviews

with others, it seems that those planners who would need to be informed about Nollan because of their adventurous planning, do inform themselves, which is also part of their style. Those planners who practice on the cutting edge, for the most part, will strive to stay on that edge, through good planning which evolves over time, and does not remain stagnant. For example, the planning staff in Newton, and more so in Amherst, is known for their innovative, bold planning initiatives. After Nollan, neither of these communities blindly continued with their bold planning initiatives. The staffs in both communities re-examined their recent actions, and improved them. Based on my observations, I can conclude that the quality of staying informed goes along with this quality of doing adventurous planning. The announcement of a Supreme Court decision such as Nollan does not paralyze these communities, it merely pushes them to do even better planning. Although it is possible, I have not observed a community which blindly practices adventurous planning.

8.5. OBSERVED MECHANISMS BEING USED TO COPE WITH NOLLAN:

Through interviews and case studies, I have observed different ways in which communities, elected or appointed officials, professionals, and advisors have attempted to cope with the Nollan decision. First, among professionals and advisors, there seems to be an informal network which arises at times of uncertainty such as this, to provide a forum for the exchange of ideas. Second, there are two different types of hierarchies through which information about the Nollan case gets disseminated to planners and communities. Finally, I have noticed an increase in advisors suggesting that every action by a

municipality be first reviewed by a competent attorney.

8.5.1. The "Network"

Following the Nollan ruling, many different professional organizations such as the American Planning Association, Home Builders Association, and the Massachusetts Municipal Association, private firms, and regional planning agencies tried to understand the impact of this decision on their constitutiencies. Conferences, forums, and talks were sponsored to try to develop an understanding as to what the actual impact of the ruling would be. Large cities and small towns alike tried to attend such meetings to find out just how they might be affected. Several of the more aggressive planners who were interviewed for this thesis expressed a professional obligation to provide assistance and advice to the towns and cities surrounding them. According to one conference sponsor, "Small towns were just quaking in their boots after the announcement of the case, and were reassured at the conferences to hear what the decisions really meant."[1]

8.5.2. Hierarchies:

There seem to be two types of hierarchies through which planners and municipal officials become informed about advances in planning and the law. First, there is the formal government structure from centralized to decentralized. According to this, the information begins at the top, at the Supreme Court, and gradually gets spread

[1]Telephone interview with Bill Picard, Planner in Worcester, Massachusetts, 3-23-88.

through the federal, state, regional, and then local level. The second type of heirarchy is one of professionals. There are those planners or land use attorneys who are known throughout the planning community as being well-informed, and who emerge in situations such as this to educate the rest of the community as to what the Nollan case means to local municipalities.

In the Massachusetts area, the second type of hierarchy was evident following the announcement of Nollan. There are about ten or twenty such experts in the area, who all participated in the circuit of lectures and conferences, reaching out to the less-informed in the community. This hierarchy of professionals in Massachusetts does not correspond to the more formal, governmental hierarchy. In other words, the expert planners who serve to educate those less-informed are sometimes at the local level, such as in Amherst. The Town Counsel in Amherst, a very small community in western Massachusetts, is one of the premier experts in land use law in the State, if not the entire New England area. He participated in national sessions with the attorneys involved in both the First English and the Nollan cases. In this case, the expert planners or attorneys at the local level inform those on the regional or state level.

8.5.3. Legal Advise:

There has been an increase in the suggestion for legal advise on all planning and land use regulation activities. A quick review of some of the planning literature shows an increase in the number of advertisements for "planning law" firms; "zoning law", or merely legal

advise. In addition, many towns are beginning to require their planners or consultants to carry liability insurance, in the event that some of their work could come under a challenge based on Nollan and First English.

8.6. CONCLUSION:

In summary, this thesis has involved investigated various towns and cities, to discover various ways in which real planners are coping with the recent Supreme Court case of Nollan v. the California Coastal Commission. I have looked for the supposed "chilling effect" which Justice Stevens predicted would befall "public officials charged with the responsibility for drafting and implementing regulations designed to protect the environment and the public welfare" in the wake of the decision.

In the research, I have observed four very interesting and diverse examples of different communities with very different planning infrastructures, political frameworks, and community backgrounds. The research produced two examples of strong, aggressive planning which continued and actually improved after the Nollan case. In Amherst, the community proceeded with its innovative growth control mechanism after careful consideration. In Newton, an ordinance which was already approved, was reconsidered, and actually made better as a result of Nollan. The final two examples, Pawtucket and Plainville seem to be relatively unaware of any need for caution or reflection.

In my small sample in this thesis, I have not observed a

"chilling effect". On the contrary, I have observed the good planning getting better, and the mainstream planning (which is likely to be challenged under Nollan) to remain relatively unaffected. Of course, one can attempt to predict how these results might be different six or twelve months later, after some community has been challenged under Nollan. The planners in Amherst and Newton seem confident that, to the best of their ability, their regulations will stand up to such a challenge. These planners have used all the possible resources available, and then made an educated decision not to suspend their planning practices in the wake of the uncertainties related to Nollan.

My final thoughts are to emphasize the need for good, sound planning. According to Robert Ritchie, Town Counsel for Amherst, "Do not stop planning or land use rgulation in the aftermath of recent decisions: If one thing is clear, planning is like walking a tightrope which as by recent case law been moved much higher from the hard ground below. You use the same skills as before, and apply the same principles; but the consequences of error (and a heightened awareness of the consequence of error) has somewhat cramped our style. Be thoughtful and cautiously-bold in land use regulation."[2]

As stressed by many commentators, planning must continue in the wake of uncertainties concerning the Nollan decision. "The decisions do, however, require municipal boards to think through their planning objectives and to be accountable for the impacts of restrictions on

[2]Ritchie, Robert. "Planning to Avoid Trouble in Municipal Land Use Regulations", Massachusetts City Solicitors and Town Counsel Association, 1987, p. 18.

landowners. Local boards can expect a higher level of scrutiny on the purposes they invoke and the limitations they impose."[3] "...But, the government can defend itself if it has good data and good reasons to justify the regulation ... Good, strong, land-use planning, based on sound record is needed."[4]

[3]McGregor, Gregory I. "Local Environmental Law, Land Use Control, and Limits to Governmental Power." Prepared for the Massachusetts Municipal Association by McGregor, Shea, and Doliner, Boston, 1987, p. 17.

[4]Gus Bauman, chief litigation counsel to the Home Builders Association of America, in Evans, E. S. "Builders Told of Court Effect on Properties", St. Louis Post Dispatch, 2-18-88.

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